Appeal Decision

by [redacted] BSc (Hons) MRICS

an Appointed Person under the Community Infrastructure Regulations 2010 (as Amended)

Valuation Office Agency
[redacted]

e-mail: [redacted]@voa.gsi.gov.uk.

Appeal Ref: [redacted]

Address: [redacted]

Development: Variation of Condition 4 (Approved Plans) of planning permission [redacted] (Variation of condition 4 (Approved plans) of Planning Permission ref: [redacted] (A part [redacted] and part [redacted] planning application comprising: Full detailed planning permission for the demolition of the existing [redacted] and [redacted] and the erection of a replacement [redacted] ([redacted] msq net trading floorspace ([redacted] msq gross internal floor area); childrens [redacted] ([redacted] msq); lobby/circulation space ([redacted] msq); [redacted] centre ([redacted] msq); flexible retail, community floorspace ([redacted] msq); office floorspace ([redacted] msq) and [redacted] residential units with ancillary [redacted] arranged in [redacted] blocks including [redacted] and [redacted] storeys; [redacted] retail and [redacted] residential parking spaces; [redacted] spaces together with associated open space, children's play space, landscaping and public realm improvements along [redacted] and a new route from [redacted] to [redacted]; Outline planning permission (with appearance, landscaping and access to be [redacted]) for [redacted] msq of flexible A1, A2, A3, A4, D1 floorspace and [redacted] dwellings within [redacted] blocks. In addition outline planning permission is also sought for a further [redacted] msq of flexible floorspace for use in association with the proposed [redacted] or A1, A2, A3, A4, D1 use.) granted [redacted]. [redacted] alterations to the development including an additional [redacted] residential units and associated layout and design alterations to the development; relocation of [redacted] area from the roof of [redacted] to be replaced with residential floorspace; removal of the [redacted] from the [redacted] and [redacted] alterations to the terraces, windows and facade treatment.) granted on [redacted] Amendment sought: Replacement of approved plans to allow minor material alterations.

Planning permission details: Planning permission [redacted] was granted by the the [redacted] on [redacted].

Decision

I determine that the Community Infrastructure Levy (CIL) payable in respect of the development is to be assessed in the sum of £[redacted] ([redacted] CIL: £[redacted], [redacted] CIL: £[redacted]).

Reasons

Background

1. I have considered all the submissions made by [redacted] (the agent) on behalf of [redacted] (the appellant) and the representations received from the Collecting Authority (CA) [redacted]. In particular I have considered the information and opinions presented in the following documents:-

   a. The planning permission in respect of the development dated [redacted].
   b. The CIL Liability Notice (LN) issued by the CA on [redacted].
   c. A copy of the agent's request for a Regulation 113 Review dated [redacted] and a copy of the CA's Review of the LN dated [redacted].
   d. The revised CIL LN dated [redacted].
   e. The CIL Appeal Form dated [redacted] with the attached grounds of appeal and other supporting documents.
   f. The CA's representations dated [redacted] and [redacted].
   g. The agent's comments on the CA's representations dated [redacted] including Counsel's opinion from [redacted] dated [redacted].

2. Planning permission was granted under Section 73 (s.73) of the Town and Country Planning Act 1990 (TCPA 1990) **(Determination of applications to develop land without compliance with conditions previously attached)** by [redacted] on [redacted]. The permission was for 'Variation of Condition 4 (Approved Plans) of planning permission [redacted] (Variation of condition 4 (Approved plans) of Planning Permission ref: [redacted] (A part [redacted] and part [redacted] planning application comprising: Full detailed planning permission for the demolition of the existing [redacted] and [redacted] and the erection of a replacement [redacted] ([redacted] msq net trading floorspace ([redacted] msq gross internal floor area); childrens [redacted] ([redacted] msq); lobby/circulation space ([redacted] msq); [redacted] centre ([redacted] msq); flexible retail, community floorspace ([redacted] msq); office floorspace ([redacted] msq) and [redacted] residential units with ancillary [redacted] arranged in [redacted] blocks including [redacted] of [redacted] and [redacted] storeys; [redacted] retail and [redacted] residential [redacted] spaces; [redacted] [redacted] spaces together with associated open space, children's play space, landscaping and public realm improvements along [redacted] and a new route from [redacted] to [redacted]; Outline planning permission (with appearance, landscaping and access to be [redacted] Matters) for [redacted] msq of flexible A1, A2, A3, A4, D1 floorspace and [redacted] dwellings within [redacted] blocks. In addition outline planning permission is also sought for a further [redacted] msq of flexible floorspace for use in association with the proposed [redacted] or A1, A2, A3, A4, D1 use.) granted [redacted]. [redacted] alterations to the development including an additional [redacted] residential units and associated layout and design alterations to the development; relocation of plant area from the roof of [redacted] to be replaced with residential floorspace; removal of the [redacted] from the [redacted] and [redacted] alterations to the terraces, windows and facade treatment.) granted on [redacted]

Amendment sought: Replacement of approved plans to allow minor material alterations' (**the S.73 permission**).

3. On the evidence submitted the relevant planning history prior to the granting of the s.73 permission which is the subject of this appeal, is essentially as follows:-

Planning permission was granted on [redacted] for 'Full detailed planning permission for the demolition of the existing [redacted] and [redacted] and the erection of a replacement [redacted] ([redacted] msq net trading floorspace ([redacted] msq gross internal floor area); childrens [redacted] ([redacted] msq); lobby/circulation space ([redacted] msq); [redacted] centre ([redacted] msq); flexible retail, community floorspace ([redacted] msq); office floorspace ([redacted] msq) and [redacted] residential units with ancillary [redacted] arranged in [redacted] blocks including [redacted] and [redacted] storeys; [redacted] retail and [redacted] parking spaces; [redacted] spaces together with associated open space, childrens play space, landscaping and public realm improvements along [redacted] and a new route from [redacted] to [redacted]; Outline planning permission (with appearance, landscaping and access to be [redacted]) for [redacted] msq of flexible A1, A2, A3, A4, D1 floorspace and [redacted] dwellings within [redacted] blocks. In addition outline planning permission is also sought for a further [redacted] msq of flexible floorspace for use in association with the proposed [redacted] or A1, A2, A3, A4, D1 use', application number [redacted] (**the original permission**).

Planning permission was granted on [redacted] under s.73 to vary conditions attached to the original permission seeking minor alterations to the development including changes to the unit mix, alterations to windows, doors, elevational detailing, landscaping and increased parking by [redacted], application number [redacted].

Planning permission was granted on [redacted] under s.73 to vary conditions attached to the original permission seeking [redacted] alterations to the development including an additional [redacted] residential units and associated layout and design alterations to the development, relocation of plant area from the roof [redacted] to be replaced with residential floorspace, removal of [redacted] from the [redacted] and [redacted] alterations to the terraces, windows and façade treatment, application number [redacted].

4. On [redacted] the CA issued a Regulation 65 LN (the original LN) based on a net chargeable area of [redacted] square metres (sqm) in the sum of £[redacted] as follows:-

[redacted] CIL - £[redacted]
[redacted] CIL - £[redacted]

The [redacted] and [redacted] CIL charges were stated to have both been based on a net chargeable area of [redacted] sqm.

5. The agent requested a Review under Regulation 113 on the [redacted] on the basis that the CA's calculation of the CIL amount payable in circumstances where the s.73 permission resulted in a reduction in the amount of chargeable floorspace was incorrect and there should be no CIL charge.

6. The CA issued their decision on [redacted] reducing the CIL charge as follows:-

[redacted] CIL - £[redacted]

[redacted] CIL - £[redacted]

The [redacted] CIL charge was calculated in accordance with Regulation 9 on the basis that the chargeable development was that granted by the s.73 permission so for indexation purposes the year in which planning permission was granted for the purposes of Regulation 40(5) was the year in which the s.73 permission was granted, [redacted], rather than the year in which the original permission was granted, [redacted].

The CIL charge for [redacted] was calculated in accordance with Regulation 128A with a charge of £[redacted] resulting from the reduction in the floorspace and the CA adopting the same indexation rates when calculating the chargeable amounts in respect of both the original permission and the s.73 permission.

7. The agent submitted a CIL appeal on the [redacted] under Regulation 114 (chargeable amount) proposing 'a zero CIL charge'. In addition, they proposed that there should be a repayment of CIL as follows:-

[redacted] - £[redacted]
- £[redacted]

Validity of Appeal

8. Before considering the grounds of the appeal I am of the opinion that it is appropriate at this stage to address the contention of the CA in their representations that the appeal may be invalid on the basis that the appellant is not entitled to request an appeal given that notwithstanding that the CA accepted the agent's letter of [redacted] as a request for a Regulation 113 Review and issued a decision, they are not an interested person as defined in Regulation 112(2) for the purposes of requesting a Regulation 113 Review. In my opinion as the CA accepted the agent's letter as a request for a Review and subsequently issued a decision and a revised LN I consider that the appellant satisfies the requirements of Regulation 114(1) and on balance, in these circumstances, there is no need for me to consider the requirements of Regulation 112(2).

In addition, the CA have taken the date of the planning permission as the date of the commencement of the development and have queried whether this means that Regulation 114(3A) (which refers to a person being able to appeal under Regulation 114 even though the development has commenced because *'planning permission was granted in relation to that development after it was commenced'*) may not apply. However, the agent has stated that construction commenced on [redacted] 'when remedial works to the [redacted] concrete structure were started'. In the absence of any evidence to the contrary from the CA I consider it is reasonable to accept the commencement date to be the [redacted] and so the s.73 permission can be treated as a retrospective permission under Regulation 114(3A).

Grounds of Appeal

9. The grounds of appeal relating to the [redacted] CIL charge, as summarised by the agent, are as follows:-

1) No [redacted] CIL is payable in respect of the third s73 permission because the CA has incorrectly interpreted and applied Regulation 9(6), (7) and (8). The Appellant makes the following alternative arguments:-

a) First, it is considered that in accordance with Regulation 9(8) the CIL calculations carried out under Regulation 40 should apply the date of "Ip" as the date of the parent permission. This applies both when carrying out the two calculations for the parent permission and the s73 permission to establish if there is a "change" for the purposes of Regulations 9(6) and 9(7) and when calculating the CIL for the chargeable development. Accordingly the proper calculation unsurprisingly reveals that the CIL liability is lower for the section 73 permission as a result of the decrease in floorspace. This is clearly in accordance with both the letter and the spirit of the CIL Regulations and the Government's statements as to the objectives. (Further it identifies that there is, in fact, an overpayment of CIL which is required to be repaid by the CA under Regulation 75 of £[redacted] together with £[redacted] of [redacted] CIL overpaid on the first section 73 permission); or

b) In the alternative, it is considered that a "change" in Regulations 9(6) and 9(7) must be read purposively to mean "increase" i.e. a change in circumstances where the chargeable floorspace is increased thus resulting in additional CIL being payable as a result of the increase in floorspace. (The same overpayments identified above should also be repaid to the Appellant).

c) If the VOA considers that [redacted] CIL is properly payable under Regulation 9 notwithstanding the reduction in floorspace then the Appellant considers that the CA has incorrectly calculated the amount of [redacted] CIL and a social housing relief deduction should have been applied. A reduced amount of [redacted] CIL of £[redacted] would therefore be payable less the sum of £[redacted] (£[redacted] together with £[redacted] of [redacted] CIL overpaid on the first section 73 permission), which should be repaid under Regulation 75 by reason of the reduction in chargeable floorspace, meaning that the final amount of [redacted] CIL liability would be £[redacted].

10. The agent provided reasons to support the grounds of appeal as follows:-

1) The appellant agrees with the CA that for the purposes of determining the amount of CIL payable, if any, in relation to a s73 permission, the relevant regulations are those at Regulations 9(6), (7) and (8).

2) It also agrees that in order to determine whether there has been any change in the CIL liability it is necessary to carry out a calculation under Regulation 40, applying Regulation 9(8) on the basis that both for the parent permission and for the s73 permission applying the same deductions for demolition etc and treating both permissions as having been permitted on the same date as the parent permission to ensure a like for like comparison, and so as to identify any "change".

3) However the Appellant does not agree with the CA's analysis that having identified that one then ignores Regulation 9(8), or confines its application, when calculating the chargeable amount where there has been a "change". Regulation 9(8) makes it clear that when carrying out the calculation of CIL liability to determine which permission is the chargeable permission for the purposes of CIL, the CIL calculation should be run under Regulation 40 calcluation in the case of a section 73 application, so that the date on which the permission is granted for the purposes of the calculation is the date of the parent permission. This is not only consistent with the wording and intent of the provisions in Regulation 9, but also the logic of the Regulations and their purpose. It avoids the consequences that arise from the CA's approach of potentially seeking to charge a greater CIL amount (because of the arbitrary effects of indexation which arise on the CA's erroneous application) where the amount of chargeable floorspace has in fact reduced from that originally permitted.

4) Further or alternatively, if and to the extent the above analysis is not accepted, the Appellant does not agree that Regulation 9(7) can properly be said to be contemplating

that it should apply in the way the CA suggests where the "change" in the amount of CIL payable is a consequence of a reduction in the amount of chargeable floorspace. To require CIL to be paid on a s73 permission that permits a development to reduce floorspace is fundamentally at odds with the underlying purpose of the CIL regime and cannot have been the intention of the draftsman of the Regulations or the Government.

5) The CA state in its letter that:-
"It is only where there is no change in CIL liability, either up or down, that the chargeable development is treated as the previous permission (that is, the parent permission)".

6) On this basis the CA considers that where the floorspace of a scheme permitted under s73 increases or decreases then Regulation 9(7) is engaged. On the CA's interpretation of Regulation 9(7) therefore notwithstanding an overall reduction in floorspace of chargeable development a landowner is invariably still obliged to pay CIL. This is because indexation is applied to the whole of the net chargeable area of the reduced development from the date of the charging schedule to the date of the permission and even after deducting the CIL from previous permissions there is likely to be some element of indexation still payable particularly on larger developments such as this. This cannot have been intended.

7) The Appellant therefore puts forward the following alternative arguments as to why the CA has incorrectly applied Regulation 9.

8) First, the Appellant considers:-

8)(a) in accordance with Regulation 9(8) the CIL calculations carried out under Regulation 40 should apply the date of "Ip" (being the index figure for the year in which planning permission is granted) as the date of the parent permission. The CA accepts that this applies when carrying out the two calculations for the parent permission and the s73 permission to establish if there is a "change" for the purposes of Regulations 9(6) and 9(7). That is the approach followed by the CA. But it would be arbitrary then to disapply this approach and carry out a different calculation when calculating the amount payable for the chargeable development.

8)(b) however when it comes to calculating the CIL for the chargeable development, (which in this case is identified as the third section 73 permission based on the "change" in the CIL liability as between the parent and third permission) the date for "Ip" is clearly intended to remain as the date of the grant of the parent permission and not the date of the grant of the third section 73 permission. This is on the basis that Regulation 9(8) is still operative for the purposes of the calculating the CIL liability for the chargeable development. This avoids the otherwise absurd consequences of the effects of indexation even where the chargeable floorspace has reduced in consequence of the section 73 application.

8)(c) accordingly the calculation reveals that a CIL liability is lower for the section 73 permission as a result of the decrease in floorspace. Further it identifies that there is in fact an overpayment of CIL (namely the difference between the parent permission and third s73 permission) which is required to be repaid by the CA under Regulation 75.

8)(d) accordingly on this interpretation the third s73 permission is not liable to payment of any further [redacted] *CIL.*

8)(e) Appendix 1 contains the CIL calculations for Regulation 9(8) purposes. The section 73 calculation demonstrates that a reduced amount of CIL would be payable when compared against the parent permission. Accordingly this sum represents the amount of the overpayment of [redacted] *CIL as a consequence of the reduction in chargeable floorspace. This sum should properly be repaid to*

the Appellant.

8)(f) conversely, were there to be an increase in floorspace a CIL calculation carried out on the basis of "Ip" being treated as the date of the parent permission would mean that the additional CIL relating to that increase only would be identified and payable to the CA. It would not result, for example, in the whole development becoming subject to newly indexed CIL.

9) Secondly, and in the alternative (if the above analysis is not accepted for any reason), the Appellant considers:-

9)(a) the reference to "change" in the CIL liability in Regulations 9(6) and 9(7) must be read purposively to mean "increase" i.e. as a change in circumstances where the chargeable floorspace is increased thus resulting in additional CIL being payable as a result of the increase in floorspace.

9)(b) on this basis in a situation where a s73 permission permits an overall reduction of floorspace then the applicable regulation would be regulation 9(6) and the chargeable development would be the development for which permission was granted by the previous permission.

9)(c) accordingly on this interpretation the third s73 permission would not be liable to payment of any further [redacted] CIL.

There are compelling arguments in support of both interpretations of the Regulations as follows:-

10) <u>The legislative framework for CIL; viability</u>

10)(a) The Planning Act 2008, section 205, gave the Secretary of State power, with the consent of the Treasury, to make regulations for the imposition of CIL. That power was to be exercised in accordance with the terms of section 205(2), as amended by the Localism Act 2011, which provides that:
"In making the regulations the Secretary of State shall aim to ensure that the overall purpose of the CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable."

10)(b) Economic viability is, therefore, fundamental to the imposition of CIL just as it is fundamental to elements of planning law more generally[1]. The regulations which have been passed, the Community Infrastructure Levy Regulations 2010, SI 2010/948 ("the Regulations") confirm this. Regulation 3 declares that CIL shall be charged in accordance with section 205 and regulations 14 and 55 both refer expressly to economic viability. The National Planning Policy Framework then re-affirms the centrality of economic viability and costs at paragraph 173.

10)(c) Regulation 14 states that:
"(1) In setting rates ... a charging authority must aim to strike what appears to the charging authority to be an appropriate balance between:
(a) the desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and
(b) the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area."

10)(d) Regulation 14(2) permits the authority to have regard to certain actual and expected administrative expenses in setting rates. Regulation 14(3) says that, in having regard to the potential effects on economic viability of the imposition of

CIL, a [redacted] council "must" take into account the rates set by the [redacted].

10)(e) The determination of economic viability for the purposes of Regulation 14 and section 205 is a factual question. The regulation is drafted in terms which necessitate a comprehensive overview of the entire situation. In order for the determination to be made, and appropriate balance in relation to costs to be struck, it is essential that all relevant facts are taken into account. Failure to do this will result in an inaccurate determination and an inappropriate balance.

10)(f) As such economic viability is of central importance to the application of the CIL regime.

10(g) Applying these principles it cannot be intended therefore that where a developer is required to respond to market conditions by reducing the floorspace of its development (in this case the reduction of both commercial retail space by the removal of [redacted] within the [redacted] and the reduction of residential floor space to remove [redacted]) that it should still be taxed under the Regulations for such a reduction.

10)(h) This otherwise operates as a twofold penalty on the developer, first in respect of the loss of saleable area and secondly the payment of erroneous CIL. This ultimately causes harm to the viability of a development which is contrary to the aims and intentions of the CIL regime.

11) *<u>The legislative framework for CIL; provision of infrastructure</u>*

11)(a) The purpose of the CIL regime is to fund infrastructure necessitated by new development and applied by the CA to projects in its area.

11)(b) As a matter of principle therefore where a development is changed so as to reduce the amount of floorspace being provided there should be no further charge to CIL because the development does not result in any increased impact or burden on infrastructure within the authority's area. Arguably depending on the extent of the reduction it would in fact result in a reduced impact and burden on infrastructure.

11)(c) In the present case the reduction in floorspace as between the original parent permission and the third s73 permission is [redacted] m^2. This is a considerable reduction and would plainly have a reduced impact and burden on infrastructure.

12) *<u>The decision of the VOA in respect of the application of Regulation 128A and Regulation 40</u>*

12)(a) The background to the introduction of Regulations 9(6), (7) and (8) to capture changes to developments made under s73 are helpfully set out in the appeal decision of the Valuation Office Agency (VOA) dated [redacted].

12(b) This appeal concerned the correct interpretation of Regulation 128A and the application of Regulation 40 on indexation on s73 permissions in transitional circumstances where the original parent permission was granted before a charging schedule was in force, and changes to the s73 were granted after a charging schedule had come into force.

12)(c) Paragraphs 1.1 to 1.4 explain why the Regulations were amended to deal with s73 changes to ensure that a s73 permission (which is a planning permission in its own right) did not give rise to a second full CIL liability.

12)(d) In particular paragraph 1.4 states:

"At the time that the 2012 regulations were introduced it was publicised that a spokesman for the DCLG has said "Our intention is that where a developer has obtained consent for a change to its plans it should pay only for the additional CIL liability created". These statements emphasise that the amendments are intended to result in an increase in CIL if there is an increase in floorspace but if there is no such increase then there will be no additional CIL" (our emphasis).

12)(e) The decision helpfully sets out the concerns regarding indexation where Regulation 128A is engaged, and the unfairness that would be caused where different indexation figures are used to compare the CIL that would have arisen from the parent permission and the CIL arising from the s73 permission applied to the whole of the chargeable development.

12)(f) At paragraph 1.30 of the VOA decision the Appellant argued- "The purpose of the amendments in the 2012 Regulations introducing reg. 128A and the changes to reg.9 are to restrict the CIL charge on a s73 permission. It is the increase in CIL relating to the change in the development authorised originally by the parent permission which is to be charged to CIL in respect of the s73 permission. It is not intended that the s73 permission should also bear the increase in CIL resulting from an application of indexation which uses figures which inevitably mean that the CIL liability applicable to the s73 permission is higher than that applicable to the parent permission and which is applied to the whole of the chargeable net area and not just the increase in the area resulting from the s73 permission".

12)(g) The VOA decision confirmed at paragraphs 12 and 13 that a purposive construction should be adopted when applying Regulation 128A and regulation 40. The VOA confirmed that the index figure for the year in which the permission was granted (Ip) should be treated as the same for both the parent permission and the s73 permission thus ensuring there is no artificial increase in indexation between the two.

12)(h) This decision supports the Appellant's interpretation of the Regulations that when running the CIL calculation for the chargeable development the date of "Ip" should be treated as the date of the parent permission to ensure that undue additional indexation is applied.

12)(i) It also supports a purposive construction of Regulation 9(6) and (7) that a "change" to the amount of CIL payable when comparing a parent permission to a s73 permission should mean an increase in CIL thus ensuring that additional CIL in the form of indexation applied to the whole of the net chargeable development of a s73 permission (even after deducting CIL sums already paid) is not payable where the developer has reduced the chargeable floorspace of its development.

The CA's Representations

11. The CA submitted representations on the [redacted] and those relating to the calculation of the chargeable amount in respect of the [redacted] CIL charge are as follows:-

<u>*Interpretation of Regulation 9(6)-(8) CIL Regulations 2010*</u>

a) It appears to be common ground (subject to what is said above regarding the question of overpayment of [redacted] CIL in relation to the first S73 permission) that what is in issue is the calculation of [redacted] CIL.

b) *It appears to be common ground between the Appellant and the CA that Regulation 9(6)-(8) and Regulation 40 are the CIL Regulations relevant to the computation of [redacted] CIL.*

c) *[redacted] CIL came into effect in [redacted], such that the index figure for the relevant year is that as at [redacted]. Both the parent and the S73 consents in this case were granted after the date of [redacted] CIL coming into effect.*

d) *It further appears to be common ground that the Regulations require the CA, when dealing with the calculation of [redacted] CIL liability involving a 'parent' planning permission and a planning permission granted under S73 TCPA, to apply some form of indexation.*

e) *The point of dispute between the parties is the indexation ratio to be applied to the grant of a S73 planning permission when the chargeable floorspace consented by that application has decreased as compared with the parent permission.*

f) *The CA's approach is as follows. First, it has calculated in accordance with Regulation 9(8) the amount of [redacted] CIL due under the parent planning permission and compared that with the amount of [redacted] CIL due under the relevant S73 consent, assuming for the purpose of the comparison exercise that both consents were granted on the date of the parent planning permission. If that comparison exercise demonstrates a change in CIL liability, Regulation 9(7) provides that the chargeable development is the most recently commenced development. In this case, that is the development consented under reference [redacted].*

g) *Second, having done the exercise to identify the chargeable development for the purposes of Regulation 9, the CA has then applied Regulation 40 to the relevant development and has applied the index figures as required by that formula, that is, without the modification to Regulation 40 provided for by Regulation 9(8) for the purposes of Regulations 9(6) and (7).*

h) *As the CA understands the Appellant's case, the Appellant contends that the modification provided for in Regulation 9(8) should be carried forward into the substantive calculation of liability under Regulation 40, with the result that the S73 consent (granted in [redacted]) should be indexed by reference to the change in the index figure for the year of grant of the parent permission compared with the index figure applicable to the year when [redacted] CIL took effect.*

i) *The CA's position is that the indexation ratio should be that of the index figure for the year when permission [redacted] was granted over the index figure for the year when [redacted] CIL came into force.*

j) *Regulation 9 is headed 'meaning of chargeable development'. The modification provided for in the calculation of Regulation 40 as contained in Regulation 9(6) and (7) is stated in Regulation 9(8) 'to be for the purposes' of those sub-paragraphs of Regulation 9. That is the only purpose of the relevant modification. There is no modification contained within Regulation 40 itself, and nothing in the Regulations carries forward that modification into the substantive calculation, once what amounts to the chargeable development has been identified.*

k) *If the modification to the calculation of liability under Regulation 40 that is provided for in Regulation 9(8) were to be carried forward into the calculation of the substantive liability (with the result that in the case of a S73 consent, indexation would always be limited to the 'gap' between the date of coming into force of the relevant charge to CIL and the granting of the parent permission) Parliament can be expected to have made that clear by express words to that effect. There is no obvious reason why it should have done so, as that approach would not be consistent with the basic principle that a S73 represents a fresh, free-standing planning permission that is assessed on the merits of the application as they stand at the time of determination.*

l) *There is no obvious justification for the Appellant's alternative case, which is that '[no] change' in Regulation 9(6) and (7) has to be read as meaning '[no] increase'. On such a construction, it would appear that there would then be no objection to the entirety of the floorspace in a S73 scheme that does result in a marginal increase in floorspace being subject to a charge to CIL that is indexed by reference to the date of the S73 permission as compared with the year of introduction of the charge. In the view of the CA, that outcome would be consistent with the notion that a S73 consent is a fresh permission, which stands apart from the original consent. There is no reason why the converse situation of a decrease in floorspace should be treated differently; the consent is nonetheless a free-standing fresh grant of planning permission.*

m) *The drafters of the Regulations elected in Regulation 9(6) and (7) to refer to a 'change' in CIL liability as between the relevant planning permissions, ignoring the effect of changes in indexation values. The word 'change' needs to be given its ordinary common sense meaning; 'change' cannot be read as meaning 'increase'. Had Parliament intended Regulation 9(6) to apply where CIL liability is either unchanged or decreases by reason of something other than the effect of indexation, it would have needed to have said that.*

n) *Amendment to the relevant wording would be a matter for Parliament.*

o) *It is noted that the Appellant relies on the appeal decision of the VOA issued on* [redacted] *in redacted form. The observations of the VOA in that appeal regarding S73 permissions and the application of the indexation provisions was specific to the context of Regulation 128A and the arguments which the charging authority was seeking to put forward in that case. The case in question was concerned chiefly with the application of Regulation 128A(3). That regulation, which is headed 'transitional provision: section 73 of TCPA 1990 applications', provides for how liability for CIL is to be computed under Regulation 40 in the circumstances when it is engaged. Regulation 128A is concerned only with an adjustment to the computation of liability in the case of S73 permissions where CIL is introduced in between the granting of the parent and the S73 consent(s), and not with the situation where both parent and S73 consent are granted after the introduction of CIL.*

p) *The specific question arising in that case was how to calculate the figure of 'Y' as required by Regulation 128A(3), that is, how the amount of CIL liability should be calculated for the parent permission if the assumption required by Regulation 128A(3) were made that the parent consent were granted on the same day as the S73 consent (and it is notable that Regulation 128A(3) requires the making of that assumption when calculating CIL liability). The charging authority had sought to apply the indexation ratio that would have applied to the parent permission under*

Regulation 40 had the figure for 'Ip' been taken as the index for the year of the parent permission, as required by a literal reading of Regulation 40 in isolation from Regulation 128A (the value of 'Y' was thereby rendered lower than it would have been had the index ratio for the year of the S73 consent been applied, with the result that the value of 'X' minus 'Y' was higher than it would have been, had 'Y' been calculated by reference to the index value for the year of the S73 consent).

q) *Regulation 128A(3) specifically directs the charging authority to compute liability for CIL under Regulation 40 as if the parent permission had been granted on the same day as the S73 consent. In fact, the requirement to index 'Y' by reference to the year relating to the S73 consent is apparent from the wording of Regulation 128A(3); arguably, no purposive interpretation is needed in order to achieve that result. The broader point is that the purpose of Regulation 128A(3) is to modify the calculation of liability under Regulation 40, unlike Regulation 9(6)-(8), the purpose of which is to identify what constitutes the chargeable development.*

r) *The published appeal decision contains redactions of all figures, which means that the detailed calculations cannot be examined. It does not appear to have been suggested in that case that [redacted] CIL should be calculated otherwise than by reference to the index figure for the year of the S73 consent.*

s) *The PPG (Paragraph: 007 Reference ID: 25-007-20140612) states 'there may be transitional cases, where the original planning permission was granted before a levy charge came into force in the area, and a section 73 permission is granted after the charge comes into force. In these circumstances, regulation 128A (as amended by the 2014 Regulations) provides for the section 73 consent to only trigger levy liability for any additional liability it introduces to the development. The government's intention is that the provisions set out in regulation 128A should apply to all subsequent section 73 permissions granted in respect of such a development where these transitional circumstances have arisen'. It is apparent from the PPG that central government was specifically concerned in Regulation 128A with the effect of the transitional situation in which CIL is introduced after the grant of the parent consent. The PPG does not extend to the situation of a parent consent and one or more S73 permissions, all of which are granted after the coming into force of a charge to CIL in a particular area.*

The Appellant's Comments on the CA's Representations

12. The agent submitted comments on the CA's representations which primarily comprised a Counsel's opinion from [redacted] in which he summarised his opinion as follows:-

a) *For the reasons set out in more detail below, I consider the Council's interpretation is wrong as a matter of law. First and foremost, I consider that the Council's interpretation fails to give proper effect to the correct construction of Regulation 9 taken with Regulation 40 of the CIL Regulations. The Council's error is to treat the Regulation 9 and Regulation 40 as requiring two different calculations to be performed for the purposes of assessing CIL liability (as set out in paragraphs 21 and 22 of their Appeal Representations); it is this which results in the absurd consequence that a reduction in chargeable floorspace can still result in an increase in CIL liability. However, I consider that misinterprets the natural meaning of Regulation 9(8) when read with Regulation 40 of the Regulations. When read together, I consider the correct interpretation is that Regulation 9(8) assumes that the calculation performed for the purposes of*

Regulation 9(6) and Regulation 9(7) is carried forward into the calculation of any CIL liability under Regulation 40. This avoids the absurd result of a change amounting to a reduction in chargeable floorspace giving rise to an increase in CIL liability.

b) *Secondly, even if the Council's interpretation of the Regulations arose on the face of the Regulations (which I do not consider it does when properly construed), such a result cannot have been intended as it would produce absurd results. It was not intended by the Government. It would mean that additional CIL could be charged where a developer wishes to reduce the amount of chargeable development in a development. The practical effect is that it is likely to deter developers from making best use of the sites. Such an interpretation would also be contrary to the spirit and purpose of the parent legislation under which it was made, namely the Planning Act 2008 and therefore give rise to a result which was ultra vires that parent Act. For either of these reasons, the Regulations should be interpreted to avoid that absurd result or ultra vires consequence.*

c) *Thirdly, it seems to me that such a result would potentially be incompatible with the right to peaceful enjoyment of property and possessions as a disproportionate interference, and so liable to be interpreted (or "read down") to be consistent with those rights in any event.*

Decision

13. Having fully considered the representations made by the appellant and the CA, I would make the following observations on the representations and the grounds of the appeal.

14. The ground of appeal relating to the [redacted] CIL charge as summarised by the appellant is as follows:-

1) By reason of Regulation 75 and a reduction in the floorspace of the chargeable development the Appellant is entitled to the repayment of overpaid [redacted] CIL in the sum of £[redacted] in any event.

15. I can confirm that in accordance with Regulation 114(1) an appeal can only be made *'on the ground that the revised chargeable amount or the original chargeable amount (as the case may be) has been calculated incorrectly'*. Therefore, as the appointed person, I do not consider it is appropriate or correct for me to consider the issue of the repayment of CIL under Regulation 75 (Overpayment) or Regulation 74B (Abatement). Neither of these regulations are relevant to the calculation of the chargeable amount under Regulation 40, as required by Regulation 9 or Regulation 124A, as appropriate. In addition, I do not consider that the issue of social housing relief is one which is relevant to the calculation of the chargeable amount and I do not therefore consider that it is appropriate or correct for me to comment on this in my decision in this appeal.

16. It is my view from the evidence put forward that there are no valid grounds of appeal relating to the calculation of the chargeable amount regarding the [redacted] CIL charge as both parties agree that no CIL is payable in respect of the s.73 permission and the appellant's claim for a repayment is effectively made under Regulation 75 (under Regulation 128A the CIL charge cannot be less than £[redacted]). Therefore, I will not comment further on the [redacted] CIL charge.

17. The parties to this appeal appear to have agreed the following:-

a) For the purposes of determining the amount of [redacted] CIL payable in relation to a s.73 permission the relevant regulations are those at Regulation 9.

b) [redacted] CIL has been paid in respect of the original permission based on a net chargeable area of [redacted] sqm.
c) The s.73 permission reduces the net chargeable area to be constructed to [redacted] sqm.
d) The chargeable development for the purposes of Regulation 9 is the development granted permission by the s.73 permission on the basis that there has been a change in the amount of CIL payable (in this case a reduction) having carried out the calculation required by Regulation 9(8) which requires the assumption that the date on which the s.73 permission first permits development was the same as the original permission, in this case the [redacted].

18. The main issue in this appeal relates to the calculation of the charge, having regard to Regulation 9 and the application of Regulation 40, in particular the indexation adjustment reflected in the formula in Regulation 40(5). The relevant regulations are set out below:-

Regulation 9

> *(6) Where the effect of a planning permission granted under section 73 of TCPA 1990 is to change a condition subject to which a previous planning permission was granted so that the amount of CIL payable calculated under regulation 40 (as modified by paragraph (8)) would not change, the chargeable development is the development for which planning permission was granted by the previous permission as if that development was commenced.*
>
> *(7) Where the effect of the planning permission granted under section 73 of TCPA 1990 is to change a condition subject to which a previous planning permission was granted so that the amount of CIL payable under regulation 40 (as modified by paragraph (8)) would change, the chargeable development is the most recently commenced or re-commenced chargeable development.*
>
> *(8) For the purposes of paragraphs (6) and (7), the liability to CIL under regulation 40 should be calculated in relation to an application made under section 73 of TCPA 1990 as if the date on which the planning permission granted under that application first permits development was the same as that for the application for planning permission to which the application under section 73 of TCPA 1990 relates.*

Regulation 40(5)

(5) The amount of CIL chargeable at a given relevant rate (R) must be calculated by applying the following formula—

$$\frac{R \times A \times I_p}{I_c}$$

where—

A = the deemed net area chargeable at rate R, calculated in accordance with paragraph (7);

I_p = the index figure for the year in which planning permission was granted; and

I_c = the index figure for the year in which the charging schedule containing rate R took effect.

19. The agent in their grounds of appeal and Counsel in his opinion are of the same view that when Regulation 9(8) and Regulation 40 are read together the calculation carried out for the purposes of Regulation 9(6) and Regulation 9(7) should be carried forward into the calculation of any CIL liability under Regulation 40. This in effect means that the index figure is adopted for the year in which the original permission was granted. In their opinion, to do otherwise would result in the absurd outcome of there being an increase in the CIL liability even though, as in this case, the chargeable floorspace has been reduced. In addition, they consider that such a result could not have been intended by the Government. However, the CA argue that the modification provided for in the calculation of Regulation 40 contained in Regulation 9(6) and (7) is specifically stated in Regulation 9(8) 'to be for the purposes' of these two paragraphs only and no such modification is contained within Regulation 40 itself. This in effect means that the index figure is adopted for the year in which the s.73 permission was granted. In addition it considers that if Parliament meant in in the case of a s.73 permission that indexation would always be limited to the gap between the date of the charging schedule and the grant of the original permission they would have made it clear by express words to that effect. The effect of the CA's interpretation is that although there was actually a significant reduction in the floorspace the amount of CIL payable is increased solely due to the application of the indexation provisions in Regulation 40 to the whole development. In my opinion this could not have been intended and I therefore favour the arguments put forward on behalf of the appellant in this case that the Regulation 9(8) calculation should be carried forward into the calculation of the CIL liability under Regulation 40.

I do not believe that the purpose of regulations 9(6)-(8) (which were inserted into the 2010 Regulations by the CIL (Amendment) Regulations 2012) was to require an extra indexation charge in cases where a S.73 permission resulted in a reduction in the floor area of the chargeable development. Therefore, in the calculation of the chargeable amount in accordance with Regulation 40 the index figure for the year in which planning permission was granted should be the figure for the year when the original permission was granted being [redacted].

20. On the evidence before me, having regard to the particular facts of this case, I conclude that the CIL charge should be as follows:-

[redacted]

Net chargeable area – [redacted] sqm @ £[redacted] sqm = £[redacted]

Plus indexation = £[redacted]

(Index [redacted] – [redacted])
(Index [redacted] – [redacted])

[redacted]

In accordance with Regulation 128A = £[redacted]

I should stress that the above figures are before any deductions that might be appropriate for overpayment, abatement or the availability of reliefs, matters which I consider are not relevant to this Regulation 114 appeal in respect of the calculation of the chargeable amount.

[redacted] MRICS
RICS Registered Valuer
Valuation Office Agency
[redacted]