

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: 1875979

Address: ``redacted``

Proposed Development: Application to vary condition 1 (approved drawings) of planning permission Ref: ``redacted`` for the 'Erection of a second floor rear extension to provide 2 self contained residential units'.

Planning Permission details: Granted by ``redacted`` on ``redacted`` under Planning Reference ``redacted``.

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £``redacted`` (``redacted``).

Background

1. Initially I considered all of the submissions made by ``redacted`` on behalf of ``redacted`` (the Appellant) and by ``redacted``, the Collecting Authority (CA) in respect of this matter. In particular I considered the information and opinions presented in the following documents:-
 - a) Planning decision ref ``redacted``, dated ``redacted``;
 - b) CIL Liability Notices dated ``redacted`` (``redacted``) and ``redacted`` (``redacted``);
 - c) Default Liability Notice dated ``redacted`` (``redacted``);
 - d) Demand Notice dated ``redacted`` (``redacted``);
 - e) Acknowledgement Notice of receipt of CIL Payment of £``redacted`` dated ``redacted``;

- f) Regulation 113 Review Request (``redacted`` & ``redacted``) and Response (``redacted``);
 - g) CIL Appeal form dated ``redacted``, including Grounds of Appeal, a Second Floor plan detailing the gross internal area (GIA), a Second Floor plan showing the comparison from ``redacted`` and ``redacted``.
 - h) Representations from CA dated ``redacted`` including:
 - Copy of ``redacted`` ``redacted`` CIL Charging Schedule 2012
 - Application Form for permission ``redacted``
 - Site monitoring photographs taken ``redacted`` and ``redacted``
 - Approved plans showing relevant elevation for ``redacted`` ``redacted``
 - Plan showing GIA measurement
 - i) Appellant's Final Comments on CA representations dated ``redacted``.
2. Following consideration of the initial information provided, I wrote to the Appellant, CA and Interested Parties on the ``redacted`` seeking further comment. I have taken account of the additional representations and documents provided within the parties' responses:
- a) Appellant's further representations dated ``redacted``;
 - b) CA's additional representations dated ``redacted`` including a further photograph taken ``redacted`` and a redacted copy of a neighbour objection to ``redacted``.

Grounds of Appeal

3. Originally an approval was received under ``redacted`` (**"the Original Permission"**) on the ``redacted`` for the 'Erection of a second floor rear extension to provide 2 self contained residential units'. The CA issued a Liability Notice on ``redacted`` (``redacted``) for £``redacted``, which was based on a chargeable development GIA of ``redacted`` square metres (sq. m.). Payment of £``redacted`` was documented as having been received by the CA dated ``redacted`` (the £``redacted`` addition is assumed to be a surcharge – although neither party have stated this in their statements but £``redacted`` is the max fee documented on the CIL Liability Notice). Subsequently, and confirmed in the representations made for the subject Appeal, both parties seem to agree the GIA stated under Liability Notice ``redacted`` was incorrect and the chargeable amount should have been based on a GIA of ``redacted`` sq. m.
4. The Subject Application (``redacted`` – **"the ``redacted`` Permission"**) was an "Application to vary condition 1 (approved drawings) of planning permission Ref: ``redacted`` for the 'Erection of a second floor rear extension to provide 2 self contained residential units,' to allow for an increase in width to approved extension and alterations to second floor fenestrations". This was approved ``redacted``.

5. The CA then issued a Default Liability Notice (``redacted``) for £``redacted`` on ``redacted`` based on ``redacted`` sq m and acknowledging a notional increase in liability. No further details have been provided by either party detailing the reasoning behind this notice. The information shown on the Default Liability Notice details a calculation which is purported to be in accordance with Paragraph 4 of Schedule 1 of the CIL Regulations.
6. On ``redacted`` a Liability Notice of £``redacted`` (LN ``redacted``) was issued detailing a CIL liability of £``redacted``. This was based on a chargeable area of ``redacted``sq. m. at the 'Residential' rate and ``redacted`` ``redacted``CIL2' rate and noted an abatement of £``redacted`` for the original amount paid under Liability Notice ``redacted``. This triggered a Regulation 113 review by the Appellant on the ``redacted`` and the CA responded 1``redacted`` maintaining their position.
7. On ``redacted``, the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount) contending that the CIL liability stated by the CA was incorrectly calculated. The Appellant is of the opinion that CIL should only be payable for an additional GIA of ``redacted`` sq. m.
8. The Appellant's grounds of appeal can be summarised as follows:
 - a) The planning permission (the ``redacted`` Permission) should be treated as a permission granted under section 73 of the Town and Country Planning Act 1990 (TCPA 1990) which sought to remove/square balconies for a better plan form and increased the total floor area by ``redacted`` sq. m.
 - b) The payment of £``redacted`` (LN ``redacted``) was made in respect of the Original Permission for ``redacted`` sq. m. The Appellants consider the CIL was assessed and paid at the time and the current CIL liability should not be used to rectify an error made by the CA under the previous application the Original Permission.
 - c) The Appellant opines that CIL should be payable, but only for the ``redacted`` sq. m. additional floorspace created by the ``redacted`` permission, contending that the provisions of Regulation 74B apply and have not been correctly applied by the CA.
9. There is no dispute around the charging rate or indexation adopted and the GIA is also agreed to be correct by both parties.
10. Both parties initially advanced to me evidence in support of their respective viewpoints. However, after considering all of the information provided as part of the initial representations, I was unable to reach a decision based on the evidence before me. Exercised in exceptional circumstances, I considered evidence from other publicly available sources, however, in such cases the Appellant, CA and Interested Parties must be given an opportunity to comment on such evidence. I wrote to share some additional information identified and provided all parties the opportunity to make any comments or representations on this information.

11. The additional information related to documents concerning whether the
“redacted” Permission was granted under S73 or S73A of the TCPA
1990. The list of additional documents was as follows:

Application Reference	Additional document
“redacted”	Schedule of Proposed Works
“redacted”	Application Form
“redacted”	Summary of materials
“redacted”	Officer Report
“redacted”	Decision Notice

12. The Appellant and CA provided further representations based on the additional documents they received. I have based my decision on all of the information and representations I have received.

Reasoning

13. The core dispute between the parties on this ground relates to whether the
“redacted” Planning Permission was granted under S73 or S73A of the TCPA
1990.
14. For the purposes of this appeal, it is important to recognise that abatement under Regulations 74A and 74B applies only where a new planning permission granted under section 73 of the Town and Country Planning Act 1990 results in a revised chargeable amount for a development on which CIL has already been paid. Abatement enables the CIL previously paid under the original permission to be credited against the liability arising from the amended permission, ensuring that a developer is not charged twice for substantially the same development. However, abatement does **not** apply to retrospective permissions granted under section 73A, as such permissions relate to development that has already taken place and do not fall within the regulatory framework governing amendment permissions. Accordingly, determining whether the permission is granted under section 73 or section 73A is essential, as it directly affects whether any credit for previously paid CIL can lawfully be applied.
15. The Appellant opines the “redacted” Permission is a permission granted under S73 that varies the approved drawings for an existing, implemented permission (the Original Permission) for which CIL was assessed and paid. The Appellant considers the methodology adopted by the CA conflicts with the CIL Regulations because they consider the CA has in effect retrospectively re-charged previously permitted and paid-for development (under the Original Permission). The Appellant refers to Schedule 1 (Part 2) of the Regulations, in particular paragraphs 3 – 5. They claim the CA’s adoption of the application as a retrospective S.73A permission and consequently applying Schedule 1 Part 1 (treating the scheme as wholly new), is a “non sequitur”.

16. The Appellant refers to Regulation 65(3) (sic – I believe the Appellant means reference to Regulation 65(10)) and argues that this specific Regulation prevents correction of historic under-measurement from the Original Permission. The Appellant confirms the requirement for the relevant application was only to regularise fenestration for fire-safety compliance and to remove/square balconies for a tidier plan form creating an increase of ``redacted`` sq. m.
17. Following the additional information I, as Appointed Person, subsequently sent out to the parties, the Appellant confirmed the points raised in their original grounds of appeal. The Appellant did not dispute that certain elements of the works progressed while discussions with the CA were ongoing, but stated the works were merely non-material or compliance-driven deviations during construction, not development that creates new chargeable floorspace for CIL purposes. Additionally, the Appellant confirmed that, at no point prior to the grant of the ``redacted`` Permission, was there a material increase in the quantum of floorspace beyond the lawful baseline established by the Original Permission. The Appellant contends the photographs merely show the progression of an already permitted scheme with evolving detailing.
18. The Appellant opposes the relevant approval being treated as a “retrospective” permission. They are of the view that even if elements of the development were carried out in advance of the formal grant of the Section 73 permission, that does not automatically disapply Schedule 1 Part 2 of the CIL Regulations. They opine Schedule 1 Part 2 exists precisely to deal with situations where a later permission modifies or varies an earlier one. It requires the decision-maker to compare the “notional chargeable amount” of permission A (the earlier permission) with permission B (the later permission) and to levy CIL only on the difference.
19. Their further representations can be summarised as follows:
- a) The ``redacted`` Permission is properly characterised as a Section 73 variation, not a new standalone permission for CIL purposes;
 - b) The circumstances relied upon by the collecting authority do not justify abandoning Schedule 1 Part 2 of the Regulations;
 - c) The correct chargeable amount must be calculated by reference to the net uplift of approximately ``redacted`` sq. m. only; and
 - d) Any calculation that seeks to charge the entirety of ``redacted`` sq. m. results in unlawful retrospective re-charging of previously paid development.
20. The CA initially argued that the ``redacted`` Permission was granted retrospectively as a S73A application and offered the following evidence in support of their position:
- a) A copy of the relevant application form received ``redacted`` where the Appellant states the development commenced on ``redacted`` and was completed on ``redacted``;
 - b) Site monitoring photographs? taken on ``redacted`` showing the window placement and grey render of the building matching the elevation plans for the ``redacted`` Permission.

- c) A further site monitoring photograph taken on ``redacted`` showing the development was completed with this same window placement and render.

21. Following the additional information I sent, as the Appointed Person, seeking comment from all parties, the CA confirmed their position was maintained, meaning the ``redacted`` Permission was granted under S73A of the TCPA 1990. Further evidence was received from the CA in the form of a neighbour objection relating to the now refused application ``redacted`` relating to the subject property and a site visit photo from a related enforcement case. The CA opines the further evidence provided additional proof that the alternative window placement had been constructed before the date that application the ``redacted`` Permission was submitted.
22. Within their further representations, the CA set out a timeline of events from their viewpoint relevant to both the Original Permission and the ``redacted`` Permission. The timeline incorporates the condition clearing applications (discharge of conditions application), the site visits made by a member of the planning department and planning enforcement officer of the CA, and relevant documents from planning applications previously mentioned in the CA's original representation.

Ground A – Is the ``redacted`` permission a S. 73 or S. 73A approval?

23. As per **Regulation 9(1)** of the CIL Regulations 2010 (as amended) '**the chargeable development is the development for which planning permission is granted**'. In this case the development for which planning permission is granted is: 'Application to vary condition 1 (approved drawings) of planning permission Ref: ``redacted`` for the 'Erection of a second floor rear extension to provide 2 self contained residential units to allow for an increase in width to approved extension and alterations to second floor fenestrations'.
24. An Appointed Person's jurisdiction when determining a Regulation 114 appeal is limited to calculating the chargeable amount in accordance with Schedule 1 of the CIL Regulations. In order to do so, on the facts of this case, I, as the AP, am required to decide whether the ``redacted`` Permission granted on ``redacted`` was granted pursuant to s.73 or s.73A of the TCPA 1990.
25. In deciding upon whether the ``redacted`` Permission might be in accordance with s.73A as the CA opines, it must be considered whether development under this permission commenced before the date of permission?(``redacted``) and whether such development breached Condition 1 to the Original Permission, which states:

(1) The approved development shall be carried out in accordance with the following drawings/details:

Energy and Water Efficiency Statement

``redacted``

``redacted``

```redacted```\n```redacted```\n```redacted```\n```redacted```\n```redacted```\n```redacted```\n```redacted```\n```redacted```\n```redacted```.

26. The Appellant states within their Regulation 113 review request, "The Section 73 application (the ```redacted``` Permission) was submitted solely to address fenestration changes required by Fire Regulations. At the same time, the removal and squaring-off of the balconies was included to achieve a more regular floor plan." This may have been the intention of the Appellant, but the actual circumstances as to what had been constructed (and when) must be considered. Furthermore, the decision notice itself does not state under what authority the approval is being granted.

27. Assessing the facts of this case:

- a) The approved plans for the Original Permission show 7 windows along the flank elevation along with the elevation treatment being described as "Anodised aluminium cladding and PPC window frames". The same flank elevation on the approved drawings for the subject planning application only show 3 windows. The site monitoring photographs were taken by the planning officer ```redacted``` (the Original Permission approved ```redacted```). The photograph shows a rendered elevational treatment to the flank elevation. There is one clear view of a window opening with no window present and a less clear view of a second window opening (obscured by tree foliage).
- b) A second site monitoring photograph taken ```redacted``` was submitted as evidence by the CA. This was taken at a slightly different angle to the first but shows the same rendered elevational treatment to the flank elevation and a clear view of two window openings with a window having been fitted.
- c) The CA had particular regard to the **window placement** and **grey render** of the building matching the elevation plans for the ```redacted``` Permission rather than those for the Original Permission when determining the subject application was a S73A permission. They opine this confirms that work diverged from the original approved plans before the application for the ```redacted``` Permission was submitted.
- d) In undertaking further research, I have found that the observation by the CA referring to the grey render demonstrated a S73A, was in fact incorrect. The decision notice for the Original Permission stated a pre-commencement condition for the external wall material:

( 3) Prior to the commencement of development (excluding demolition) the type and treatment of the materials, including samples, to be used on the exterior of the building(s) shall be submitted to and approved in writing by the Local Planning Authority. The approved materials shall be used in the construction of the development hereby approved, completed prior to its occupation/use and retained thereafter.

- e) On the ``redacted``, the CA's planning department approved the render material under a Clearing Conditions Application ``redacted``. Therefore, this element had approval prior to the submission of the ``redacted`` permission and is not considered to confirm the ``redacted`` Permission was a 73A approval.
- f) The other issue raised on window placement is a different matter. The CA set out evidence in their timeline as to when they first became notified and confirmed when works - contrary to approved plans - had taken place.
- g) From the timeline information provided it was noted a complaint was received by the CA's Planning Department on the ``redacted``, which led to a site inspection on the ``redacted``. A photograph from this site inspection referred to windows to the rear of the second floor extension showing the windows were not consistent with approved drawings for the Original Permission but are consistent with the approved drawings under the now ``redacted`` Permission.
- h) According to the timeline provided, a subsequent application was made under reference ``redacted`` to regularise works already taken place, which was refused. The subject application (the ``redacted`` Permission) was then made and approved. This regularised the works that had already been undertaken.

28. The timeline provided by the CA shows that the windows approved under ``redacted`` Permission were already installed prior to the submission of that application. This was in direct breach of Condition 1 of approval the Original Permission, a point the Appellant has not disputed.

29. It is my view a S. 73 application cannot be used where the relevant condition has already been breached before the application is made, as section 73 governs only applications to develop **without complying with conditions prospectively**. In contrast, section 73A(2)(c) of the TCPA 1990 expressly provides that planning permission may include permission for development carried out before the date of the application **“without complying with some condition subject to which planning permission was granted.”** I am satisfied that, the inclusion of this wording confirms that the statutory power to regularise development undertaken in breach of a condition derives from section 73A rather than section 73. Accordingly, on the facts, planning permission the ``redacted`` Permission was correctly issued as a **section 73A approval** under the Town and Country Planning Act 1990.

**Ground B & C - The current CIL liability should not be used to rectify an error made by the CA during the collection of CIL under the Original Permission / CIL should be payable but only for the ``redacted`` sq. m additional floorspace created by the ``redacted`` Permission**

30. Regulation 5 of the CIL Regs defines the term planning permission as including **“(a) planning permission granted by a local planning authority under section 70, 73 or 73A of TCPA 1990”**.

Regulation 9(1) of the CIL Regs defines **“chargeable development”** as **“the development for which planning permission is granted”**.

31. Where permission is granted pursuant to s.73A it exists as a fresh planning permission, rather than an amendment to the existing planning permission. Consequently Regulation 65(10) would not apply in this instance as per the Appellant’s contention (reference paragraph 16).

32. Regulation 40 therefore provides that for a s.73A permission, the CA must calculate the amount of CIL payable (**“chargeable amount”**) in respect of a chargeable development in accordance with the provisions of CIL Regulations **Paragraph 1 of Schedule 1** in respect of ‘standard cases’.

$$\frac{R \times A \times IP}{IC}$$

Where:

A = the deemed net area chargeable at rate R, calculated in accordance with subparagraph (6);

IP = the index figure for the calendar year in which planning permission was granted;

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

#### **Abatement: Section 73 Applications**

74A.—(1) This regulation applies where—

- a) CIL has been paid in respect of a chargeable development;
- b) **a new planning permission is later granted in relation to that development under section 73 of TCPA 1990**; and
- c) the collecting authority has issued a new or revised liability notice in respect of that development because the chargeable amount has changed.

#### **Abatement: implementation of a different planning permission**

74B.—(1) This regulation applies where—

- a) a chargeable development has been commenced under a planning permission (A);
- b) a different planning permission (B) has been granted for development on all or part of the land on which the chargeable development under A is authorised to be carried out; and
- c) the charging authority receives notice from a person who has assumed liability to pay CIL in relation to B that the chargeable development under A will cease to be carried out and that the chargeable development under B will commence.

(2) Where this regulation applies a person who has assumed liability to pay CIL in relation to B may request that the charging authority credits any CIL paid in relation to A against the amount due in relation to B.

**(3) To be valid a request under paragraph (2) must be—**

- a) made before the chargeable development under B is commenced; and**
- b) accompanied by proof of the amount of CIL that has already been paid.**

(4) Subject to the following paragraphs of this regulation, the charging authority must grant any valid request made under paragraph (2).

(5) This regulation does not apply where B is a planning permission granted under section 73 of TCPA 1990.

6) Any CIL paid in relation to A can only be credited against the CIL due in relation to B to the extent that the CIL paid in relation to A relates to buildings (“relevant buildings”) that—

- a) have not been completed when the request is made; and
- b) are not taken into account in reducing the chargeable amount in relation to B through the operation of regulation 40 and Schedule 1.

(7) Where—

- a) B is a phased planning permission; and
- b) the amount to be credited against the CIL due in relation to B is greater than the amount due in relation to the first phase of B commenced after a request under this regulation has been granted, the remainder must be credited against the next phase or phases of B until there is no remainder.

(8) Paragraph (9) applies where—

- a) a request under paragraph (2), which is a valid request, is made in respect of the amount due in relation to B;
- b) a relevant building is completed under A after the valid request is made (whether the completion occurs before or after the chargeable development under B commences); and
- c) a reduced amount of CIL is paid in relation to B as a result of the grant of the request under this regulation.

(9) Where this paragraph applies the person who was granted the abatement under this regulation must pay to the collecting authority an amount equal to the amount of CIL paid in relation to that relevant building which was credited against the amount due in relation to B.

(10) For the purposes of this regulation the amount payable under paragraph (9), if paid, is to be treated as CIL paid in relation to B.

(11) Abatement may be granted more than once in relation to a planning permission.

33. In respect of abatement, Regulation 74A applies only to applications made under Section 73. As this appeal concerns a retrospective Section 73A permission, Regulation 74A has no application. Regulation 74B can apply to other forms of permission; however, it requires prior notification to the Charging Authority that one planning permission will cease and another will commence. Such notification is not possible where the permission is retrospective. Accordingly, Regulation 74B is also inapplicable. In my judgement, the Charging Authority misapplied abatement when issuing the CIL Liability Notices dated ``redacted`` (LN ``redacted``), contrary to the wording of the Regulations, resulting in a benefit to the Appellant.

34. With there being no dispute around the charging rate, indexation or GIA adopted by the CA, I am satisfied the calculations for ``redacted`` and ``redacted`` CIL adopting Paragraph 1 of Schedule 1 and set out on Liability Notice ``redacted`` are acceptable.

## **Decision**

35. Based on the facts presented to me, I consider the Community Infrastructure Levy (CIL) charge in this case of £``redacted``. (``redacted``) not to be excessive and I hereby dismiss this appeal.

``redacted``

``redacted`` MRICS  
Principal Surveyor  
RICS Registered Valuer  
Valuation Office Agency

Date: 18 February 2026