Appeal Decision

by [redacted] BEM MRICS

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

Valuation Office (DVS)
Wycliffe House
Green Lane
Durham
DH1 3UW

e-mail: [redacted] @hmrc.gov.uk.

Appeal Ref: 1890433

Address: [redacted]

Proposed Development: Construction of a part 1, part 2-storey rooftop build-to rent residential extension (Use Class C3) including rooftop amenity area, alongside a refurbishment and change of use of the existing building from education to a mix of residential (Use Class C3) and flexible employment/community/retail floorspace (within Use Classes E and F), together with hard and soft landscaping, refuse and recycling storage, cycle parking, disabled car parking, and all ancillary works and associated development.

Planning Permission details: Granted by [redacted] on [redacted], under reference [redacted] and associated reference [redacted].

Decision

I determine that the Community Infrastructure Levy (CIL) chargeable amount in this case should be £[redacted] ([redacted]).

Background

1. I have considered all of the submissions made by [redacted] of [redacted] on behalf of [redacted] of [redacted] (the Appellant) and by [redacted],

the Collecting Authority (CA) in respect of this matter. In particular I have considered the information and opinions presented in the following documents:-

a) Planning decision ref [redacted] and Listed Building Consent, dated [redacted] with Location Plan;
b) CIL Liability Notice dated [redacted];
c) Regulation 113 Review Request ([redacted] & [redacted]) including Statutory Declaration from [redacted] dated [redacted], a dated copy of the Tenancy at Will (dated [redacted]), some photographs of part of the property in use and bank statements showing income rental receipts to [redacted].
d) The CA's Response to Regulation 113 Review Request ([redacted]);
e) CIL Appeal form dated [redacted], including (as referenced by the Appellant):
    - Grounds of Appeal
    - CIL Appeal VOA Decision Ref [redacted]
    - CIL Appeal VOA Decision Ref 1842091-2024 06 05
    - [redacted] Transactions
    - Tenant Payment Confirmation-[redacted]
    - Valuation Report - [redacted]
    - Valuation Report - [redacted]
    - Caretaker Photo -[redacted]; and
    - CIL Appeal VOA Decision Ref 1790876-2022 04 11
f) Representations from CA dated [redacted] including:
    - Copy of CA's CIL Charging Schedule 2024
    - Application Form for permission [redacted] including planning statement, Existing Plans, planning application form and extracts from the planning application form
    - Non Domestic Rates Bills for the period dated [redacted] – [redacted] relating to Ground Floor Mezzanine, First Floor, Second Floor and Third Floor – all dated [redacted] highlighting the Business Rate Supplement Empty Relief
    - Under Section 171BB(2), a signed certificate stating the exact date this sufficient evidence was discovered by [redacted].
g) Appellant's Final Comments on CA representations dated [redacted] including:
    - Further Statutory Declaration from the caretaker dated [redacted] with additional evidence and photographs included
    - A further two CIL appeal decisions dated [redacted] and [redacted]
    - A Rating Expert's opinion, [redacted], including Counsel's opinion

- An email from [redacted] confirming the Notice of Break to the Tenant
- A revised gross internal area (GIA) and CIL Calculation and Schedule of Areas within the building.

2. Planning permission was granted under Planning Decision reference [redacted] and Listed Building Consent dated [redacted] for, “Construction of a part 1, part 2-storey rooftop build-to rent residential extension (Use Class C3) including rooftop amenity area, alongside a refurbishment and change of use of the existing building from education to a mix of residential (Use Class C3) and flexible employment/community/retail floorspace (within Use Classes E and F), together with hard and soft landscaping, refuse and recycling storage, cycle parking, disabled car parking, and all ancillary works and associated development.”

3. I understand that a CIL Liability Notice was issued [redacted] (Reference [redacted]) for £[redacted] based on a Chargeable Area of [redacted] m² under “Residential Zone 1” and [redacted] m² for “All Other Development”, a total Chargeable Area of [redacted] m², a “[redacted] CIL [redacted]” charge was included. No off set GIA was noted on the Liability Notice.

4. On [redacted], the Valuation Office received a CIL appeal made under Regulation 114 (Chargeable Amount) contending that the CIL liability stated by the CA was incorrectly calculated. The Appellant considers the chargeable GIA created by the development to be [redacted] square metres (sqm), thus providing a CIL Charge of £[redacted] (£[redacted] & £[redacted] CIL [redacted]).

Grounds of Appeal

5. The Appellant contends that the CA has incorrectly calculated the value of A (the deemed net chargeable area) for the purposes of Regulation 40 and Schedule 1 of the Community Infrastructure Levy Regulations 2010 (as amended). Specifically, the Appellant argues that the CA has failed to deduct the GIA of part of the existing building, which the Appellant maintains qualifies as an in-use building. The Appellant's case is that the relevant floorspace was in a lawful use for a continuous period of at least six months within the three years ending on the day planning permission first permitted the chargeable development. As such, the Appellant submits that this existing floorspace should have been offset against the GIA of the chargeable development when calculating the net chargeable area, resulting in a lower CIL liability.

6. The area of the chargeable development itself and the area of the existing building are not disputed just the deemed net chargeable area.

7. There is no dispute around the charging rate or indexation adopted.

Reasoning

8. The core dispute between the parties in this case relates to the interrelated CIL Regulation concepts of “relevant building” and “lawful use” in accordance with **Schedule 1 Part 1 1. (10) of the CIL Regulations 2010 (as amended).** In relation to calculating the deemed net chargeable area of the chargeable development.

   The calculation of the chargeable amount is contained in the provisions of Schedule 1 of the 2019 Regulations. In this case (which is a ‘Standard Case’ under Schedule 1) the provisions of paragraphs (3) and (4) of Part 1, Schedule 1 are key; they state:-

   (3) The relevant rates are the rates, taken from the relevant charging schedules, at which CIL is chargeable in respect of the chargeable development.

   (4) 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 sub-paragraph (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.

   The value of ‘A’ in the above formula, must be calculated by applying the following formula—

$$G_R - K_R - \left(\frac{G_R \times E}{G}\right)$$

where—
G = the GIA of the chargeable development;
GR = the GIA of the part of the chargeable development chargeable at rate R;

KR = the aggregate of the GIAs of the following—

(i) retained parts of **in-use buildings**; and

(ii) for other relevant buildings, retained parts where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development;

E = the aggregate of the following—

(i) the GIAs of parts of in-use buildings that are to be demolished before completion of the chargeable development; and

(ii) for the second and subsequent phases of a phased planning permission, the value Ex (as determined under sub-paragraph (7)), unless Ex is negative, provided that no part of any building may be taken into account under both of paragraphs (i) and (ii) above.

Further clarification under Schedule 1 (10) is provided. An "**in-use building**" means a building which—

(i) is a **relevant building**, and

(ii) **contains a <u>part</u> that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development**.

"**Relevant building**" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.

Schedule 1 Part 1 1.(8) states, **"where the collecting authority does not have sufficient information, or information of sufficient quality, to enable it to**

establish that a relevant building is an in-use building, it may deem it not to be an in-use building."

Meaning of **"chargeable development"** is set out in Regulation 9.—(1) **The chargeable development is the development for which planning permission is granted.**

9. Planning permission was granted on [redacted]. Therefore, the period to consider the lawful use for a continuous period of at least six months within the preceding three years is between the [redacted] to [redacted].

10. The appeal centres on the CA's position that the requirements of KR (i), as set out in Schedule 1(6) of the 2019 Regulations, have not been satisfied. Accordingly, the CA does not accept that the floorspace of the existing buildings can be deducted from the GIA of the chargeable development in order to calculate the net chargeable area for CIL purposes. In particular, the dispute relates to whether the building qualifies as an "in-use building" as defined under Schedule 1(10). The CA initially understood that the entire building was vacant following its previous lawful use as an educational establishment. The Appellant subsequently asserted that part of the building had been used for storage during the relevant period, and that this use was sufficient to satisfy the KR (i) requirements, notwithstanding that it applied only to part of the building. The CA rejected this position on the basis that the storage use did not constitute a lawful use, and, therefore, could not be relied upon to meet the statutory tests.

11. Both parties have advanced to me evidence in support of their respective viewpoints.

12. The Appellant accepts that the property is currently vacant but considers this to be irrelevant on the basis that the storage use ceased in [redacted]. Responding to the CA's Regulation 113 Review findings, the Appellants set out their case accordingly.

13. In response to the CA's contention that no Business Rates liability had previously arisen in respect of the area subject to this appeal and used for storage purposes, the Appellant submits that this may be attributable to eligibility for Small Business Rate Relief. The Appellant further argues that the existence, or otherwise, of a Business Rates assessment is not determinative of whether a use is lawful for the purposes of the Community Infrastructure Levy Regulations. It is maintained that matters relating to rating liability fall outside the scope of the present appeal and should not be afforded significant weight in determining whether the building qualifies as an in-use building.

14. The Appellant argues that the Statutory Declaration provided to the CA as part of the Regulation 113 review request has been incorrectly assessed in isolation rather than alongside the full body of evidence, they provided. They opine the declaration is a sworn legal document confirming continuous storage use from [redacted] to [redacted] and should carry significant evidential weight. The Appellant emphasises that CIL decisions should be made on the balance of probabilities, considering all evidence collectively rather than requiring perfect records. They reference previous CIL appeal decisions supporting this approach.

15. As part of their supporting evidence, the Appellant provided additional payment records to demonstrate rent payments across the full period of occupation. The Appellant states that the payment values align precisely with the tenancy agreement, supporting its authenticity, in their view. Additionally, the provision of the independent valuation reports from [redacted] and [redacted] are also relied upon as corroborating evidence of ongoing storage use for the relevant part of the building.

16. The Appellant accepts that continuous photographic evidence is unavailable but argues the evidence provided is a reasonable expectation for storage use. They contend the images provided are said to support the existence of the use at relevant times, with further imagery supplied to strengthen this position.

17. The Appellant's Agent argues the omission of storage use in the planning application is said to be unsurprising considering its minor and ancillary nature relative to the primary educational use. The Agent opines the relevant areas were unchanged by the proposals and may not have been known to the planning agent at the time. The Agent, on behalf of the Appellant, maintains that planning documentation is not determinative of lawful use under the statutory CIL tests.

18. The Appellant rejects the relevance of a prior Appeal Decision (Ref 1790876) provided by the CA, arguing that the facts differ materially. Unlike that case, in their opinion their evidence is said to cover the full relevant period and includes a comprehensive Statutory Declaration. The Appellant contends that no evidence has been produced by the CA to show any cessation of use and that the declaration should be accepted in the absence of contrary evidence.

19. The CA's primary position is that the Appellant has failed to demonstrate lawful use on the balance of probabilities. Accordingly, the building does not qualify as an 'in-use building' and no CIL offset is available. The CA advances both a primary case (insufficient evidence of continuous use) and an alternative case (the use is not lawful in any event under s.191(3A) Town and Country Planning Act (TCPA) 1990).

20. The CA opines the burden of proof rests with the Appellant to demonstrate [redacted] years of actual and continuous use. Absent of sufficient evidence for that period, lawful use cannot crystallise under s.191(2) TCPA 1990 and the claimed offset fails. To support their case, as part of their representations, the CA has provided certification pursuant to S171BB(2) of the TCPA 1990 dated [redacted]. The document states that, "Evidence sufficient in the [redacted] Local Planning Authority's opinion to justify an application for a planning enforcement order in relation to the apparent breach of planning control due to the material change of use of the fourth, sixth and seventh floors of the [redacted] at [redacted] from educational use to storage use (B8) without planning permission first came to the Local Planning Authority's knowledge on [redacted]."

21. The CA contend a fundamental contradiction with the planning application and places significant weight on the [redacted] planning application, which declared the building vacant, identified the entire property as F1 (education), and made no reference to storage use. These contemporaneous declarations are said to directly contradict the Appellant's current case and undermine its credibility. The CA rejects the Appellant's explanations for the omission of storage use, concluding that the issue is not mere omission but positive and inconsistent declarations. They state the responsibility for those declarations, rests with the Appellant.

22. In their representations, the CA question the evidence provided by the Appellant. They draw attention to the Planning Statement submitted by the Appellant in the relevant planning application which confirms the building was vacant from [redacted], save for property guardians. In their view, the presence of guardians is treated as evidence of vacancy. The CA contend these contemporaneous records are considered more reliable than retrospective appeal evidence.

23. The CA strongly submits that the evidence relied upon is inadequate: the tenancy shows only a right to occupy, not actual use; the statutory declaration lacks corroboration; payment records do not demonstrate use; photographs are limited; and valuation reports only provide snapshot evidence. In their view overall, the material is insufficient to establish continuous use.

24. Supporting their view of absence of use, Business Rates records provided by the CA show the property as vacant. The small business relief explanation provided by the Appellant is rejected by the CA, and furthermore the absence of a certificate of lawfulness is said to further weaken the Appellant's case.

25. The CA relies on previous VO decisions to support their view. In particular, the decisions the CA includes in their representation highlight that contradictions

reduce evidential weight, lease and financial evidence do not prove actual use, and that authorities may deem buildings not ‘in-use’ where information is insufficient. It is their view that even if continuous use were established, the CA argues it is not lawful because the period for applying for a planning enforcement order has not expired. Therefore, the statutory condition for lawfulness is not met. The CA contend the Appellant has not proven continuous lawful use, the building is not an ‘in-use building’, and no offset applies.

26. In addition, the CA also identifies that the CIL rate applied may be incorrect and submits that the overall liability may in fact be higher if recalculated.

27. Following receipt of the CA’s representations, the Appellant responded with further representations and maintains that sufficient, consistent and corroborative evidence has been provided to demonstrate lawful use on the balance of probabilities. They argue that the CA has misapplied the evidential test by assessing individual items in isolation rather than considering the cumulative weight of evidence and maintains that the CIL liability is overstated with an offset required.

28. The Appellant emphasises that storage use does not require continuous physical presence of people, but rather occupation by stored materials. Continuous rent payments and supporting documentation (lease, valuation reports, photographs and statutory declarations) are relied upon as evidence of sustained use, in their view.

29. The Appellant opines that continuous use in the context of the particular use as storage has been met by the evidential standard. They argue that perfect documentary evidence over long periods is unrealistic, particularly for low-intensity uses. In their view the correct approach is the balance of probabilities based on cumulative evidence. The Appellant maintains that the evidence demonstrates continuous use from [redacted] and lawful use from [redacted].

30. In terms of the planning application contradictions raised by the CA, the Appellant reiterates acceptance of an error in the planning application but characterises it as an innocent omission relating to a very small proportion of the building (less than 1%). They argue this is the only inconsistency and should not outweigh the wider body of consistent evidence.

31. In terms of the concealment argument posed by the CA, the Appellant rejects any suggestion of deliberate concealment, stating there was no intention to mislead and no incentive to conceal such a minor use. It notes that the CA has not pursued enforcement action and contends that concealment requires clear intent, which is absent in their opinion.

32. The Appellant disputes the relevance of the Business Rates evidence provided by the CA, stating the storerooms were not separately assessed and that absence from the rating list does not indicate absence of use. Within their further representation, the Appellant has sought an opinion from a Rating Expert ([redacted]) who advises landlords, developers and occupiers on business rates drawing from his practical experience on whether based on the evidence prided to him, whether rateable occupation occurred. As part of the opinion, a legal opinion from [redacted] of [redacted] was included. [redacted] states in his report dated [redacted] that, "Historically there has been no requirement on ratepayers to notify the Council of any missing assessments and I regularly see areas missing from a valuation assessment of entire buildings which do not have a corresponding rating assessment/liability…It is the VO (Valuation Office's) duty to maintain and update the rating list and whilst there is an intended shift toward a new ratepayer 'duty to notify' this won't come into full effect until [redacted]."

33. The Appellant's legal advice states, "Non-appearance of the area in the list as a separate entry does not negate rateable occupation as a matter of fact or law. The list is evidential and administrative; liability turns on the actuality of occupation of a hereditament. Where the list fails to reflect the facts, it is the list that should be altered. The Council's or the VO's lack of awareness likewise does not prevent rateable occupation from existing in law; it simply explains why an alteration had not been made."

34. [redacted] concluded it was his opinion, based on the evidence provided, the area in question was occupied by [redacted] for the period in question. He concludes that responsibility for ratings lies with the authority and that small areas may be overlooked.

35. The Appellant argues that obtaining a Lawful Development Certificate is optional and that lawful use can arise automatically through expiry of the enforcement period without the need for formal certification. They recognise the CA's stance that the building cannot be lawful as there was concealment and not immune from enforcement or deemed lawful. However, they contend that the CA has not issued any planning enforcement order as required by s. 191(3A) of the TCPA, nor have they applied or been granted a relevant court order by a Magistrate as a necessary of s. 171BA.

36. In response to Appeal Decisions highlighted by the CA, the Appellant contends that the CA has selectively relied on appeal decisions and that, properly interpreted, those decisions support the principle that cumulative and consistent evidence can establish lawful use and criticises the CA for failing to assess the evidence holistically.

37. The Appellant maintains the building qualifies as an 'in-use building' and that the correct application of offset results in a significantly reduced CIL liability. The Appellant concludes that the CA has placed disproportionate weight on a minor inconsistency, while the overall evidence supports lawful use from [redacted] and qualifying use within the relevant period in accordance with the Regulations.

Decision

38. As the Appointed Person, in terms of the single ground of appeal, consideration must be given to the relevant statutory framework is set out within Schedule 1, Part 1 of the Community Infrastructure Levy Regulations 2010 (as amended) and sections 171B and 191 of the TCPA 1990. In particular, for an existing building to qualify as an "in-use building" under paragraph 1(10) of Schedule 1, it must be demonstrated that:

    - the building contains **a part** that has been in **lawful use** for a continuous period of at least six months within the relevant three-year period; and
    - that lawful use arises either by planning permission or **through immunity from enforcement under section 191 TCPA 1990**.

    I, therefore, consider these are the two issues to cover in this decision.

39. The parties agree that the relevant issue in this appeal concerns whether the storerooms within the building were in lawful Class B8 storage use, such that the building qualifies as an "in-use building" and the existing GIA must be taken into account in the CIL calculation. The burden of proof rests with the Appellant and the applicable standard is the balance of probabilities.

40. The primary issues from both are:

    - The Appellant considers it has demonstrated actual and continuous use for storage purposes over a [redacted] -year period ending in [redacted], such that the use became lawful through the operation of section 191(2) TCPA 1990.
    - The CA contends that the use cannot be lawful by reason of the provisions relating to concealed breaches of planning control.

41. The relevant parts of the TCPA 1990 I must draw attention to are as follows:

    s1913A Certificate of lawfulness of existing use or development

(3A)In determining for the purposes of this section whether the time for taking enforcement action in respect of a matter has expired, that time is to be taken not to have expired if—

(a)the time for applying for an order under section 171BA(1) (a "planning enforcement order") in relation to the matter has not expired,

(b)an application has been made for a planning enforcement order in relation to the matter and the application has neither been decided nor been withdrawn, or

(c)a planning enforcement order has been made in relation to the matter, the order has not been rescinded and the enforcement year for the order (whether or not it has begun) has not expired.

(4)If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(5)A certificate under this section shall—

(a)specify the land to which it relates;

(b)describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c)give the reasons for determining the use, operations or other matter to be lawful; and

(d)specify the date of the application for the certificate.

(6)The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

171BA Time limits in cases involving concealment

(1)Where it appears to the local planning authority that there may have been a breach of planning control in respect of any land in England, the authority may apply to a magistrates' court for an order under this subsection (a "planning enforcement order") in relation to that apparent breach of planning control.

(2)If a magistrates' court makes a planning enforcement order in relation to an apparent breach of planning control, the local planning authority may take enforcement action in respect of—

(a)the apparent breach, or

(b)any of the matters constituting the apparent breach,

at any time in the enforcement year.

(3)“The enforcement year” for a planning enforcement order is the year that begins at the end of 22 days beginning with the day on which the court's decision to make the order is given, but this is subject to subsection (4).

(4)If an application under section 111(1) of the Magistrates' Courts Act 1980 (statement of case for opinion of High Court) is made in respect of a planning enforcement order, the enforcement year for the order is the year beginning with the day on which the proceedings arising from that application are finally determined or withdrawn.

(5)Subsection (2)—

(a)applies whether or not the time limits under section 171B have expired, and

(b)does not prevent the taking of enforcement action after the end of the enforcement year but within those time limits.

171BB Planning enforcement orders: procedure

(1)**An application for a planning enforcement order in relation to an apparent breach of planning control may be made within the 6 months beginning with the date on which evidence of the apparent breach of planning control sufficient in the opinion of the local planning authority to justify the application came to the authority's knowledge.**

(2)For the purposes of subsection (1), a certificate—

(a)signed on behalf of the local planning authority, and

(b)stating the date on which evidence sufficient in the authority's opinion to justify the application came to the authority's knowledge,
is conclusive evidence of that fact.

(3)A certificate stating that matter and purporting to be so signed is to be deemed to be so signed unless the contrary is proved.

(4)Where the local planning authority apply to a magistrates' court for a planning enforcement order in relation to an apparent breach of planning control in respect of any land, the authority must serve a copy of the application—

(a)on the owner and on the occupier of the land, and

(b)on any other person having an interest in the land that is an interest which, in the opinion of the authority, would be materially affected by the taking of enforcement action in respect of the apparent breach.

(5)The persons entitled to appear before, and be heard by, the court hearing an application for a planning enforcement order in relation to an apparent breach of planning control in respect of any land include—

(a)the applicant,

(b)any person on whom a copy of the application was served under subsection (4), and

(c)any other person having an interest in the land that is an interest which, in the opinion of the court, would be materially affected by the taking of enforcement action in respect of the apparent breach.

(6)In this section “planning enforcement order” means an order under section 171BA(1).

42. The Appellants contend that the CA has neither applied for nor obtained a Planning Enforcement Order pursuant to sections 171BA and 171BB of the Town and Country Planning Act 1990. They submit that no order exists under section 191(3A) and that, accordingly, the use should be assessed by reference to whether it was lawful during the relevant period for the purposes of the Community Infrastructure Levy Regulations.

43. I acknowledge the Appellants' submission. However, for that argument to succeed, it must be established that the provisions extending the period for enforcement are incapable of applying in this case. The CA contends that the storage use was deliberately concealed and has produced a certificate under section 171BB(2) of the 1990 Act confirming the date upon which it first became aware of the alleged breach. Whilst that certificate does not itself render the use unlawful, nor does it constitute a Planning Enforcement Order, it preserves the CA’s ability to apply for such an order within the statutory period. The effect of section 191(3A) is that a use cannot be regarded as lawful on the basis of the

passage of time where the statutory provisions relating to concealed breaches remain capable of being engaged.

44. The CA's position is that an application for a Planning Enforcement Order may be made within six months of [redacted]. In those circumstances, the possibility of enforcement action has not been extinguished and the question of whether the use has become lawful through the passage of time remains unresolved. I, therefore, conclude that the storage use cannot presently be treated as lawful for the purposes of the Community Infrastructure Levy Regulations.

45. Accordingly, I find that the area relied upon by the Appellants does not qualify as lawful in-use floorspace for the purposes of Regulation 40 and Schedule 1 of the CIL Regulations. The building, therefore, does not meet the requirements of an "in-use building" and no deduction falls to be made in respect of that floorspace.

46. On the basis of the evidence before me, I conclude that the Community Infrastructure Levy (CIL) payable in this case should be £[redacted] ([redacted]) and I hereby dismiss this appeal.

[redacted]

[redacted] BEM MRICS
Principal Surveyor
RICS Registered Valuer
Valuation Office
Date: 21 July 2026