00Appeal Decision

by [redacted] MRICS Registered Valuer Solicitor (Non-Practising)

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: 1814012

Planning Permission Ref. [redacted]

Address: [redacted]

Planning Permission: Change of use to create commercial storage facility (use class B8 storage)

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £0 (Nil).

Reasons

1. I have considered all the submissions made by [redacted] as agent for [redacted] (the Appellant) and [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. Application for Planning Permission dated [redacted]
b. Design and Access Statement dated [redacted].
c. Site Plan and Site Layout Plan dated [redacted]
d. Planning Decision reference: [redacted] dated [redacted].
e. CIL Liability Notice dated [redacted].
f. [redacted] CIL Charging Schedule dated [redacted]
g. CIL Reg 113 Review request dated [redacted]
h. Reg 113 Review Decision dated [redacted]
i. CIL Reg 114 Appeal dated [redacted] - Statement of Case and accompanying documents including, copies of Planning Inspector Appeal Decisions and CIL Appeal Decisions
j. Written Representations Of [redacted] dated [redacted] including Planning Inspector Appeals

k. Final Comments from Appellant dated [redacted]

2. Planning permission for the above development was granted by [redacted] on [redacted] ([redacted]). The CA implemented its CIL Charging Schedule for this location in January 2016.

3. Following the grant of planning permission the CA issued a CIL Liability Notice on [redacted] in the sum of £[redacted] pence. This is based on a net chargeable area of [redacted] square meters @ £[redacted] per square metre with an index of [redacted].

4. The Appellant requested a review of the Liability Notice on [redacted].

5. On [redacted] the CA completed a review of the CIL Charge and confirmed their decision that the existing Liability Notice is valid. The CA stated in the decision notice that it was their view that the development was liable for CIL and referred to attached appeal decisions to support this view. In addition the CA determined that the exemption under Regulation 6(2) did not apply to the current case and that the Charging Schedule applies to both storage and distribution uses within Use Class Order B8.

6. Valuation Office Agency received a CIL appeal dated [redacted], made under Regulation 114 (chargeable amount) contending that CIL should not be charged.

7. The appellant's main grounds of appeal are summarised below:

1. Whether containers on the site are buildings

The Appellants contends that the approved storage containers are not 'buildings' for the purposes of CIL and therefore there is no liability for CIL.

The containers do not meet the definition of a building and do not meet the established planning tests for buildings in terms of size, permanence and physical attachment.

Appeal decisions were enclosed to illustrate that the siting of storage containers would be deemed to be a change of use of land, rather than operational development. In planning law, similar circumstances relate to caravans which are again not considered to be buildings.

The Appellant's case aims to show that the Local Planning Authority validated and determined the submitted planning application on the basis that it sought permission for the change of use of land, as referenced within the development description, rather than for the provision of buildings. The submitted application forms did not detail the provision of any floorspace and the application fee was calculated on the basis of the standard application fee of £[redacted] for a change of use of land not involving the provision of any new floorspace. Should the LPA have considered that what permission was being sought for was building operations, then the relevant fee of £[redacted] for the creation of [redacted] sq.m of floorspace would have been required. This was not the case and the application was submitted and determined on the basis of a change of use of land, not the erection of buildings and/or floorspace

The Appellant submitted a Planning Inspectorate Appeal Decision dated [redacted] relating to [redacted], which sought a certificate of lawfulness to site a storage container on land. In assessing the container using the aforementioned 'tests' the Inspector concluded at paragraph 8 that the container was not a 'building' and that its location of the site was therefore a "use rather than operation development".

2. **Whether the buildings are buildings into which people do not normally go.**

The Appellant contends that for the purposes of the CIL Regulations, the approved storage containers would constitute "a building into which people do not normally go".

The Appellant's case is that whilst people can go into the containers, they wouldn't normally go into them often for periods of several months. The Appellant does not see any difference between how the containers would be used in their case and buildings which people only go into intermittently for inspecting plant.

Buildings for the purposes of the CIL Regulations, as set out at Regulation 6(2) and as referred to within the CA's CIL Charging Schedule, do not include "a building into which people do not normally go".

The Appellant contends that even if the storage containers could be considered to be 'buildings', having regard to the three tests, for the purpose of the CIL definition of a building as set out at Regulation 6(2), such buildings would have to be somewhere where people would 'normally' go into to be subject to CIL.

The Appellant states that the dictionary definition of 'normally' is "usually or in most cases." In the case of the approved storage containers the level of use will vary, however many of the containers will not be accessed for a period of months, perhaps only a few times a year given the nature of storage related uses.

The Appellant suggests a term such as 'occasionally go into' would be more appropriate in these particular circumstances. This is a matter that has been debated at numerous appeals and the Appellant referred to a CIL appeal relating to the erection of two agricultural buildings at Appendix D of their submission.

The Appellant sought to demonstrate that the approved buildings were not buildings where people would normally go into. However the Inspector considered that the buildings, which would be used perhaps only once a day for the purposes of feeding and checking on livestock, were sufficiently used to warrant being buildings into which people would normally go into. It is the case however that the approved units would certainly be used at a much lower intensity than this given the very nature of the use whereby items are stored away from a person's home or business premises where they are only needed for occasional use with many containers accessed often monthly or a few times a year.

As such it is the Appellants case that the containers, even if they were considered to be 'buildings' in the planning sense, cannot be considered to be 'buildings into which people would normally go into' and are therefore not buildings for the purposes of the CIL Regulations.

3. **The CA`s Charging Schedule does not apply to storage use.**

The Appellant contends that the CA's CIL Charging Schedule does not clearly show that CIL payments are required for storage uses as approved in this development. If the requirement was to apply CIL to all uses within the B8 (Storage and Distribution) use class, then the charging schedule would specifically have referred to 'Storage and Distribution'. The Charging Schedule only refers to 'Distribution'. The Charging Schedule sets out a rate of £[redacted] per square metre for 'Distribution' uses. After this the notes below the Schedule then defines Distribution as "Distribution relates to B8 use as per the Use Classes Order."

The Appellant confirms that the site is not a distribution use and not accessible by HGV's. The Appellant contends that the reference to B8 use class below the table in the Charging Schedule is to clarify that a distribution use is one that falls within the B8 use class, not that CIL should be applied to all uses in the B8 use class.

The Appellant states that it cannot be reasonably considered that rental or land values for low key storage uses would be anything like those associated with largescale distribution developments and as such it was never the intention to apply the levy to these types of storage use.

The Appellant therefore considers for these reasons that CIL should be assessed at £Nil.

8. The CA made their representations in response to the grounds of appeal above and the main points are summarised below:-

1. Containers Are Not Buildings

The CA stated that Appellant`s case is centred around the issue that the approved storage containers are not 'buildings' as they do not meet the definition of a building and do not meet the established planning tests for buildings in terms of size, permanence and physical attachment for the purpose of CIL and therefore there is no liability for CIL.

The CA counter this by stating that there is no definition of a 'building' in the CIL regulations although a 'building' is defined in Section 336 of the Town and Country Planning Act as including any structure or erection and any part of a building, but not plant or machinery comprised within a building.

The CA refer to the case of *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd [1949] 1QB 385*, which was endorsed by the Court of Appeal in *Skerritts of Nottingham Ltd v SSETR (No.2) [2000] 2 PLR 102* which held that three primary factors were identified as decisive on what was a building: a) Size b) Permanence; and c) Physical attachment. No one factor is decisive.

Using the same three-part test as above, the CA confirmed the following:

A full planning permission was granted which would allow 98 containers to be sited and to remain there permanently. Even if the 5-year lease as mentioned in the Regulation 113 appeal claim is not extended, the 5-year period is still considered a significant degree of permanence. There is no indication that the containers are likely

to be moved once positioned and specialist equipment may be required to move them.

The containers will be fixed to the ground by their own weight. The CA referred to recent Planning Inspectorate Appeal decisions dated 17 April 2020 (Appendix 4 – Land East of The Enterprise Centre, Dawsons Lane, Barwell, Leicestershire LE9 8BE) and 18 June 2012 (Appendix 5 – Smallbrook Farm. Clehonger, Hereford HR2 9TP) which in both cases the inspector considered that the containers should be regarded as buildings and are operational development.

As a result the CA contends that due to the scale/size, permanence and the physical attachment, the storage containers are classed as 'buildings' for the purposes of Planning and CIL Regulations.

2. Storage Containers Are buildings Which People Do Not Normally Go Into.

The Appellants second claim relates to CIL Regulation 6(2) where they allege that the storage containers are exempt as they fall within the definition of 'a building into which people do not normally go'. This applies to buildings such as plant rooms or machinery rooms which would be frequented for inspection or maintenance purposes, or which were granted planning permission for a temporary period.

The CA states that the subject buildings would have unlimited 24-hour access according to the planning application form which is contained in Appendix 6 of their submission. The CA considers that due to the scale of the development with unlimited 24-hour access, where users can come and go as frequently as their needs dictate, that it is reasonable to assume the development will be accessible on a regular basis.

The CA have therefore argued that there is no ground for an exemption under Regulation 6(2) as it does not accept that the storage containers are used in a similar way to a building into which people do not normally go. Furthermore they state that garages and storerooms which may be used in a similar way to that which is described by the Appellant are buildings which are not exempt under Regulation 6.

3. The Charging Schedule Only Relates to Distribution but Not Storage

The Appellants third claim is on the matter of the table within the Charging Schedule referring to 'Distribution' uses only. The accompanying note confirms that this refers B8 uses as per the Use Classes order. The permission granted for this development is for B8 uses and there is no condition restricting the use to solely storage.

The CA are of the opinion that the development of 98 storage containers are buildings which are not exempt under CIL Regulation 6. Planning permission was granted for B8 use class which is liable to CIL.

The CA therefore seeks that the appeal is dismissed and that CIL liability contained within the Liability Notice dated [redacted] in the sum of £[redacted] is confirmed.

9. The Appellant responded to the CA's representations as follows:-

1. **Definition of a Building:**

The Appellant referred to the CA`s case at paragraph 3.4 - 3.5: Within these paragraphs the Council assess the storage containers against the 'tests' for whether a structure constitutes a 'building', as established within the Skerritt's of Nottingham case.

The CA then provided two Planning Inspectorate appeal decisions to support their view that storage containers are 'buildings'. The CA consider that as the planning permission has not been granted for a temporary period, that as specialist equipment is required to move the units and that they are fixed to the ground by their own weight, that the containers therefore satisfy the tests established through the Skerritt's case and are buildings.

The storage containers are assessed against the same 'tests' within the Appellants submission and similarly the Appellants case is supported by a Planning Inspectorate appeal decision which determined that the containers are not 'buildings'.

Having regards to the 'Size' test, it is evident that the containers arrive on site fully assembled, have no foundations and are designed for taking on and off site with relative ease, hence why they are used for transporting goods in the shipping industry.

The CA`s view that their weight fixes the containers to the ground is a strange view in the Appellant`s opinion as this could be applied to any heavy object or structure whose weight would make it difficult to move.

The Appellant`s understanding of the Skerritt's case is that the structures would have to have some sort of physical attachment to the ground. The Appellant states that the containers do not meet these tests – they are not manufactured on site, are capable of being moved around, onto and off site and are not fixed to the ground. A storage container is a functional item, used for transporting and moving goods. To argue that a container becomes a 'building', it has no characteristics of a building, once it placed on a site for a longer-term basis, seem wrong.

Comparing the containers with static caravans, which are treated as not being buildings within the planning system, the Appellant fails to see how storage containers are any different. They are both brought onto site following manufacture off site and moved and transported by specialist equipment. Caravans do not become buildings in the absence of a condition limiting the length of a planning permission. They will often remain on site for many years and would still not be considered to be a building.

It is also material to note that the CA included a CIL appeal decision with its decision letter for the Regulation 113 review dated [redacted] which referred to another case where CIL had been charged on storage units. It is the Appellant`s view that little weight should be attributed to this as upon review the key issue that was being discussed was whether CIL should be charged because there was already a planning permission in place for storage units on the site and that the principle of charging CIL on a storage unit was not being challenged by the Appellant or a matter considered by the Appointed Person.

2. **Buildings Into Which People Do Not Normally Go:**

The CA responded to the Appellants claims that the containers are ‘buildings into which people do not normally go.’ In the Appellant`s view there is a difference between a ‘building into which people normally go into’ and a ‘building that people can go into’, or ‘occasionally go into’.

It is the Appellant`s view that the storage containers fall within the latter category. Whilst people will clearly go into the storage units from time to time, for the vast majority of users the containers would be for storing items that they cannot accommodate at home, items that they rarely use. As such, people may not go into the containers for months on end, perhaps even longer.

This level of use is much lower than the appeal example cited by the CA for the erection of 2 agricultural buildings, which determined that an agricultural building accessed on a daily basis to tend to cattle was a building that people do normally go into.

3. **Charging Schedule:**

Whereas the CA contend that the B8 use refers to both storage and distribution uses, the Appellant argues that the reference to B8 use class below the table in the Charging Schedule is to clarify that a distribution use is one that falls within the B8 use class, not that CIL should be applied to all uses in the B8 use class.

The CA argue that there is no condition restricting the use solely to storage. The Appellant contends that this is an error on the part of the CA and it is unreasonable to charge CIL on the basis that the site could be used for a distribution use merely because it falls within the same use class as the development permitted in this case.

The Appellant argues that there are other uses in the Charging Schedule where this situation arises – for example ‘Food Retail (Supermarkets)’ which falls within the same category as other retail uses (A1 use class - now incorporated into the E use class).

It is the Appellant`s view that ‘Distribution’ uses only are covered by the Charging Schedule and that the reference to B8 use is to define what a ‘Distribution’ use is – not that all uses within the B8 use class are chargeable developments. Furthermore they contend that if the Charging Schedule was to include storage uses then this should be clearly stated in the Charging Schedule.

Decision

10. There are three main aspects to this appeal and I will deal with each in turn.

1. **Are the containers buildings?**

The Appellant`s case revolves around the issue that storage containers are not buildings. They do not fit the definition of buildings in terms of size, permanence and physical attachment. The Appellant supplied an appeal case where the Planning Inspector concluded at paragraph 8 that the container was not a 'building' and that its location on the site was therefore a "use rather than operation development".

The CA however, provided two Planning Inspectorate Appeal Decisions where the opposite view was taken and determined that storage containers were in fact buildings.

The argument put forward by the Appellant does have merit. Applying the 3-part planning test – the storage containers are certainly large enough in terms of size to constitute a building but in terms of physical attachment the test fails as the containers can easily be moved with the appropriate lifting equipment.

These containers appear to be shipping type containers of steel construction measuring 6060mm long x 2440mm wide x 2600mm tall that are brought onto the site fully assembled and positioned into place by a crane. The containers stand in place by their own weight alone. They are not fixed to the ground and are not connected to any services. The containers can be moved around the site or removed from the site. Likewise the degree of permanence required to satisfy the test, in my view, is not present with such containers. Again the ability to move the containers negates the permanence test.

I acknowledge that there are opposing views in the Planning Inspectorate Appeal Decisions provided by both parties as to whether a container is a building or not which support their respective arguments. Taking a step back and asking what a reasonable person would consider as a building, it is my decision that such a person would not view a shipping container as a building within the broader meaning of the word as it lacks the essential characteristics of a building. They are containers, not buildings.

Furthermore the Appellant stated that the LPA validated and determined their planning application on the basis that it sought permission for the change of use of land rather than for the provision of buildings. The application fee was calculated on this basis that no floorspace was being provided. A charge of £[redacted] for the standard application fee was made for a change of use of land not involving the provision of any new floorspace.

The Appellant contends that if the LPA was of the view that permission was being sought for was building operations, then the relevant fee of £[redacted] would have been required for the creation of [redacted] sq.m of floorspace.

Although not compelling, it does provide additional support to the Appellants argument that the planning permission was for the change of use of land not for the development of buildings.
The CA contend that there is no definition of a 'building' in the CIL Regulations and referred to a definition of 'building' in Section 336 of the Town and Country Planning Act as including any structure or erection and any part of a building, but not plant or machinery comprised within a building.

While this in itself does provide guidance I do not consider it decisive for CIL purposes. "Any structure" could refer to a statue or other such structure which, although, would fit this definition, would not be considered as a building.

The CA also referred to the case of *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd [1949] 1QB 385*, which was endorsed by the Court of Appeal in *Skerritts of Nottingham Ltd v SSETR (No.2) [2000] 2 PLR 102* which identified three primary factors as being decisive as to what was a building: a) Size b) Permanence; and c) Physical attachment. No one factor is decisive.

The CA stated that full planning permission was granted which would allow 98 containers to be sited and to remain there permanently. They contended that even if the 5-year lease is not extended, they still considered that the 5-year period gave a significant degree of permanence. There was no indication that the containers are likely to be moved once positioned and specialist equipment may be required to move them.

Although the CA is right to make this point, I do not consider this to be determinative of a building as these containers can still be moved around the site and can be removed from the site if so required. The element of permanence is therefore absent.

The CA also stated that the containers will be fixed to the ground by their own weight. The CA referred to recent Planning Inspectorate Appeal decisions dated 17 April 2020 (Appendix 4) and 18 June 2012 where in both cases the inspector considered that the containers should be regarded as buildings and are operational development. As a result the CA were of the view that due to the scale/size, permanence and the physical attachment the storage containers are classed as 'buildings' for the purposes of Planning and CIL Regulations.

While the containers will be resting on their own weight, in my view they are not physically attached to the land and have no services connecting them to the ground. There is nothing stopping them from being lifted from their current position to another location. Furthermore the Appellant supplied a Planning Inspectorate Appeal Decision which determined the contrary, that storage containers were not buildings.

Having considered both sides of the argument, I consider that the storage containers lack the characteristics of a building and as CIL only applies to buildings then CIL is not applicable in this case on the basis of this aspect of the appeal.

Buildings Into Which People Do Not Normally Go:

This second element of this appeal relates to the issue of whether the containers are buildings into which people do not normally go.

Regulation 6 of the CIL Regulations provides:

6.—(1) The following works are not to be treated as development for the purposes of section 208 of PA 2008 (liability)—

(a)anything done by way of, or for the purpose of, the creation of a building of a kind mentioned in paragraph (2); and

(b)the carrying out of any work to, or in respect of, an existing building if, after the carrying out of that work, it is still a building of a kind mentioned in paragraph (2).

(2) The kinds of buildings mentioned in paragraph (1)(a) and (b) are—

(a)a building into which people do not normally go;

(b)a building into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery.

The Appellant contends that if the storage containers are deemed as buildings then by the nature of their use, where people store items generally for long periods of time meaning that they do not enter the containers for weeks if not months on end, they fall within Regulation 6(2) being buildings into which people do not normally go.

The CA on the other hand argue that this exception only applies to buildings such as plant rooms or machinery rooms which would be entered infrequently for inspection or maintenance purposes.

The containers on the other hand have unlimited 24-hour access and users can come and go as frequently as their needs dictate and as a result, it is reasonable to assume the development will be accessible on a regular basis.

Furthermore the CA argues that garages and storerooms which may be used in a similar way are buildings which are not exempt under Regulation 6.

On this point the CA has a strong argument. There is nothing at all to stop anyone from accessing their storage container. Indeed the claim of 24-hour access suggests that access can be made at any time. In practice however, there may be cases where storage containers are used but accessed on an infrequent basis, but this does not alter the fact that there is unencumbered access at all times and for this reason, I would determine that these storage containers do not fall within the Regulation 6(2) exemption.

The CA`s Charging Schedule does not apply to storage use.

On the third element of the appeal, the Appellant contends that the Charging Schedule does not apply to storage use.

The Appellant states that the CA's CIL Charging Schedule does not clearly show that CIL liability arises for storage uses as approved in this development. They further contend that if the requirement was to apply CIL to all uses within the B8 (Storage and Distribution) use class, then the Charging Schedule would specifically have referred to 'Storage and Distribution' and as it only refers to 'Distribution' then this infers that it does not apply to a 'Storage' use.

The CA however counters this by stating that the accompanying note in the Charging Schedule confirms that this refers to B8 uses as per the Use Classes Order. The permission granted for this development is for B8 uses and there is no condition restricting use to solely storage.

Having considered these points it is clear that the Schedule of CIL Rates states: "Distribution – at a CIL Rate of £[redacted] per sq.m."

In the definition notes below the Schedule Of CIL Rates "Distribution" is defined as "Relates to B8 use as per the Use Classes Order". In my view this definition merely clarifies that "Distribution" is connected to a B8 use. The definition is not saying all B8 uses are included or the Schedule would have provided for this.

I am of the view that as the Charging Schedule explicitly states 'Distribution' and omits 'Storage' then a storage use is not covered by the Charging Schedule. The fact that "Distribution" alone is stated is compelling. If the CA wanted 'Storage' to be subject to CIL, then this should have been explicitly stated or if a broader definition was to apply then adopting "All B8 uses" would have covered storage. This, however, is not the case. It is incumbent on CA`s to be clear as to what is and what is not subject to CIL. As 'Storage' has not clearly been stated within the Charging Schedule then in my view, it should not be subject to CIL.

Decision

On the basis of the above, I determine that the storage containers are not 'buildings' for the purposes of CIL and are therefore not subject to CIL and I find in favour of the Appellant.

On the second point – whether the storage containers are buildings into which people do not normally go under Reg 6(2) is arguable, however on this ground I find in favour of the CA as there is 24-hour access and no limit on anyone accessing their unit if they so wish.

On the third point, 'Storage' use has been omitted from the Charging Schedule and if this was so required then this could have been explicitly included within the Schedule to avoid any potential confusion. As such, I find in favour of the Appellant.

12. Based on the evidence before me and having considered all of the information submitted in respect of this matter, I am of the view that, on the facts of this case, the CIL payable should be £0 (Nil).

[redacted]

Name and Qualifications of Valuer:	[redacted] MRICS Registered Valuer Solicitor (Non-Practising)
Date: 24th March 2023	