

Planning and Borough Development

Kensington Town Hall, Hornton Street, LONDON, W8 7NX

Executive Director Planning and Borough Development

Mr Jonathan Bore



THE ROYAL BOROUGH OF
KENSINGTON
AND CHELSEA

Mr Philip Staddon BSc, Dip, MBA, MRTPI

Planning Inspectorate

2nd July 2014

Please ask for: Jonathan Bore

Dear Mr Staddon,

Examination of the Royal Borough of Kensington and Chelsea's Community Infrastructure Levy (CIL)

I write in response to your letter dated 27 June 2014, received by the Council on 30 June 2014 regarding this Borough's Community Infrastructure Levy Examination.

We consider that the approach taken, in terms of both method and procedure, is demonstrably inconsistent with that of the other CIL Examiners in London.

Below I detail the differences concerning the procedure which the examination has followed, and the matters you have raised. I have at the same time drawn these to the attention of the Planning Inspectorate because they demonstrate inconsistency in approach among PINS CIL Examiners. Obviously there are significant implications for this Council if the examination cannot continue to a successful conclusion.

Failings in Procedure

Your letter raised two 'fundamental issues' relating to the rate setting methodology and the treatment of the Borough's Strategic Sites. These issues have come as a complete surprise to officers and other interested parties who were involved with the examination process.

Firstly, the criticisms of the evidence base and the Draft Charging Schedule were not raised within the agenda or questions for the examination. This is highly unusual in the context of a CIL examination. In other local authorities, examiners raising such questions have allowed the councils concerned to provide more substantive responses during the Examination. Given that the Council was given no prior insight into your likely criticism of the evidence base, it would be unreasonable to reject the DCS without further opportunities to supplement the evidence base.

Secondly, from our understanding of other CIL examinations, the Examiner has the option of keeping the Examination open and receiving more evidence to address what he perceives to be the deficiencies identified in his letter. Given that the perceived issues with the 2014 viability work can be remedied relatively easily, it would be unreasonable not to afford the Council an opportunity to address this criticism. Other examiners have kept their examinations open for several rounds of additional evidence to address specific issues raised during the examinations,

Direct Line: 020 7361 3012

Email: Planning@rbkc.gov.uk

Web: www.rbkc.gov.uk

including the London Boroughs of Tower Hamlets, Islington and Lambeth. At Tower Hamlets, the Examiner has even suggested kept the option open of another supplementary hearing to discuss new evidence with interested parties.

Thirdly, with regards to interpreting the evidence base on the interaction with affordable housing, the results indicate that large parts of the Borough are able to absorb both the proposed CIL and the target levels of affordable housing. Given that the issue of the conflict between affordable housing and CIL only affects the lowest value areas in the Borough, an Examiner may recommend a reduced or nil rate in these areas, rather than rejecting the whole DCS. Matters surrounding affordable housing are discussed further below.

We believe that the approach taken in this case, in which there was no raising of questions or issues prior to the examination hearing, nor any perceived resolution of matters within the examination hearing, fails to adhere to the guidance issued by PINS: 'Examining Local Plans Procedural Practice', in particular paragraph 12 which acknowledges:

"An unsound conclusion has important resource implications, both in terms of time spent by the Inspector examining the document and the investment in time and commitment by the LPA and other stakeholders that will have been made up to that point. However, that situation should be much less likely to occur if the LPA has followed the front-loaded consultation procedures and Inspectors are proactive in the initial stages by identifying any fundamental concerns early in the examination process."

The absence of communication of these issues also contravenes DCLG CIL Guidance with states, within paragraph 036:

"Examiners may hold a pre-hearing meeting, where they consider it appropriate. The examiner may use this pre-hearing meeting to undertake an initial check that the charging authority has complied with the legislation when preparing its charging schedule, and that the appropriate available evidence is sufficient. This can help to identify potential problems prior to the examination and save time and effort. The examiner may also use a pre-hearing meeting to discuss how the examination will be managed, to identify the main issues to be considered..."

Not only is the approach taken in terms of process inconsistent with that of other CIL Examiners, but it has resulted in an unnecessary waste of local authority time and resources during a period of austerity. Should the Council have to revert to earlier stages of the charging schedule formation process, then it is likely that we will be unable to achieve collection of CIL before the imposition of the April 2015 pooling restriction. This will have a significant impact on the Council's ability to provide much needed infrastructure in the Borough to support and facilitate further development.

Outstanding Issues

Your letter raises 5 issues with the DCS which may be summarised as follows:

1. The Council's reliance on strategic sites to deliver the scale of housing identified in the Plan
2. The relationship between affordable housing and CIL rate setting and in particular whether CIL can be set using achieved levels of affordable housing where these are lower than the strategic target.
3. Perceived differences in approach between the 2012 viability study and the 2014 'real sites' viability testing.
4. The content of the Regulation 123 list
5. Perceived 'unduly complicated' charging schedule

1. The Council's reliance on strategic sites

The letter notes that the Borough has tested two strategic sites and the selection of Earl's Court and Kensal Gas Works ('KGW') is considered reasonable. Within the assessment of KGW it is suggested that *"the evidence points clearly to the need to treat that site differently too."*

From our understanding of this letter it appears that this conclusion is derived by reference to the residual land value generated by the appraisals, which equates to £3.8 million (no CIL) and £3.0 million (with the proposed CIL of £110 per square metre). As these residual values are lower than the lowest benchmark land value in the 2012 study, the letter concludes that the site should be treated differently, presumably meaning a lower or nil rate.

Given that the site is in use as a gas works and has substantial abnormal costs, it is not surprising that any scheme generates a lower land value than others. Just because the site does not generate a land value that exceeds one of the benchmark land values used in the 2012 study does not mean that it will not come forward for development. The landowner would accept that their land value may be lower than others, due to the need to clean up the site. The findings have failed to have regard to the 'pre' and 'post' CIL appraisals, which demonstrate a relatively modest impact (i.e. a reduction from £3.8 million to £3.0 million per gross hectare). Furthermore, there has been no regard for the flexibility in the Council's affordable housing policy that would allow for a modest reduction to ensure the land value is unaffected by CIL (a reduction in affordable housing of only 1.91% would fully mitigate the impact of CIL on the KGW scheme).

The conclusions contained in the letter of 27th June also disregard the anticipated timing of the delivery of the KGW scheme. Officers clearly indicated to you during the Examination that the site was highly unlikely to come forward during the life of the current charging schedule. Given that there is currently a significant amount of uncertainty about the site, including whether there might be Crossrail Station, it is too early to undertake definitive viability work so far in advance of the site coming forward.

2. Relationship between the proposed CIL rates and affordable housing

The conclusions contained within your letter suggest that charging authorities must base their CIL rates on the level of affordable housing required in their policies. In many cases, the summary evidence submitted to the Examination demonstrates that it would be possible to achieve both the proposed CIL rates alongside 50% affordable housing. Issues arise in the lower value parts of the Borough, where schemes are only viable with a reduced affordable housing percentage.

Although the conclusions appear to accept that the policy is not a fixed requirement, they assert that "the flexibility [in the policy] is limited". In adopting this position, the conclusions fail to recognise that the situation under CIL is no different from the current situation under Section 106; every pound that the Council takes in Section 106 contributions could have been used to fund more affordable housing. There has always been a balance that must be struck on a site-by-site basis.

The approach on RBKC's charging schedule is significantly out of step with other CIL examinations in London.

The Examiner at Islington's CIL examination noted the following:

*Para 17. This assessment shows that while a number of developments could provide 50% affordable housing under the charging rates now proposed, achieving this figure on all relevant sites remains a challenge. However, the wording of policy CS12(G) accepts that the 50% figure represents a Borough-wide target that may not be achieved within all individual schemes. As such, **neither the conclusions of the CILVS nor the fact that lower levels of affordable housing have been tested are sufficient to undermine the CS policy requirement.** Furthermore, as already noted, the CIL liability applying to such developments represents a small percentage of the overall development costs. **The CILVS shows that substantial reductions in the proposed CIL rate would have very limited effects on the delivery of affordable housing. For example a change of £100 in the CIL rate would result in an average change of only 2% in affordable housing provision.** I return to this matter when discussing the delivery of development below.*

*Para 41. The CILVS states that the transition to CIL from payments under Section 106 would have a very limited impact on the delivery of affordable housing (an average change of less than 2%). As already noted, the **costs arising from the CIL charges in respect of residential***

developments would represent a small percentage of the overall development costs. These factors suggest that, notwithstanding the challenges to date in achieving a Borough-wide target of 50% affordable housing provision, **the introduction of CIL would not materially worsen the current position.** Indeed, given that affordable housing (that is eligible for social housing relief) is presently subject to contributions under section 106 but would not be charged CIL, the introduction of CIL may potentially encourage the inclusion of more affordable housing.

A similar approach was accepted by the Examiner at Newham:

15. The Core Strategy was adopted in January 2012. Policy H2 was supported by an Affordable Housing Economic Viability Study and seeks the provision of 35 to 50% affordable housing on sites with a capacity of 10 units or more. However, the Council concede that, at present, the majority of new schemes are unable to deliver affordable housing at the level required by Policy H2. According to the Viability Study, at 35% affordable housing, most sites are not viable regardless of CIL.

16. As stated in the Viability Study, **if a scheme is not viable before CIL is levied it is unlikely to come forward and CIL is, therefore, unlikely to be a material consideration in any development decision. Consequently, the Viability Study, sensibly in my view, did not factor in unviable schemes in recommending appropriate rates. The Viability Study is based on 35% provision of affordable housing (for schemes of 10 or more units).** EXAM 3 contains further detail and analysis regarding the impact of CIL on the provision of affordable housing and concludes that 'a variation in CIL has only a marginal effect on the viability of a scheme and the level of affordable housing that is secured'.

And at Waltham Forest:

15. Notwithstanding the development plan requirement, the AHVS suggests that a maximum level of only 20% affordable housing can be delivered in current market conditions. The Council confirms that, in practice, a reduced level of affordable housing provision has been accepted in many cases where a proven viability case has been made. **It is not for this report to comment upon the relationship between the 20% figure and the 50% target that is contained in the above-noted LP policies.** However, bearing this evidence in mind, and notwithstanding the need to ensure that the Local Plan delivery target is not undermined by proposed CIL charging rates (a matter considered below), **it is appropriate in principle for the VSU to test residential development viability against the lower figure as well as against the 50% target set out in the CS.**

16. The VSU indicates that a residential CIL rate of £70 is generally viable in cases where affordable housing is provided at 20%. When tested against 50% affordable housing provision, two of the relevant development typologies (sites types 4 and 69) are shown to also be viable when CIL is charged at this rate. However, substantial viability problems are demonstrated in site type 5, which relates to a flatted scheme of 100 units, where affordable housing is provided at 50%. Given that the CS makes particular reference to intensifying residential uses and building at higher densities in the Borough's four key growth areas¹⁰, site type 5 appears to represent an important part of the Borough's future housing supply. This suggests that, in present market conditions, achieving the 50% affordable housing target from general housing development within the Borough represents a significant challenge. It is contended by the Council that, within the Borough as a whole, the resulting shortfall has been compensated for by the delivery of 100% affordable housing developments that are subject to separate funding arrangements.

17. In any event, the VSU also demonstrates that, in respect of site type 5, **the cost of providing affordable housing is considerably greater than the CIL rates that are now proposed. For example the residual land value (RLV) model suggests that increasing the amount of affordable housing from 20% to 50% in such a scheme would result in a cost of some £7m: in contrast, a CIL rate of £70 psm would result in a cost of some £½m.** The potential CIL liability applying to such a development therefore represents a small percentage of the overall deficit arising from a scheme providing 50% affordable housing. As such, **reducing the CIL requirement (or removing it altogether) would make little difference to overall scheme viability.** A substantial deficit would remain even if a nil CIL charge was applied. Indeed, the sensitivity testing carried out for the VSU suggests that such a deficit would remain

in some cases even if the amount of affordable housing is reduced well below the 50% figure. The underlying problem in such circumstances is that the value generated by residential development is lower than some existing use values.

Copies of these Examiner's Reports are attached as an appendix for information.

It is clear that the approach taken in the case of our own Examination is very different from the approaches that have been adopted by fellow examiners within the London context. It would be illogical to assume that every single result in a viability assessment should show that sites can deliver 50% affordable housing when this is not the level being achieved on the ground. This point has been accepted elsewhere in London.

In addition, since the 2012 viability report was undertaken, values have increased significantly in RBKC and it is not apparent that sufficient regard has been paid to the movements in viability over the intervening period although they were clearly pointed out by the Council's representatives at the public examination.

3. Perceived differences in approach between the 2012 and 2014 viability work

The letter of 27th June indicates that little weight is to be given to the 2014 testing of the twelve 'real world' sites due to a 'departure from the methodology employed in the substantive Viability Study (2012)'. The 'departure' is simply that the twelve sites were tested both with and without the proposed CIL levels in each zone so that the impact of the CIL could be tested in terms of a percentage change in land value. In the vast majority of cases, this exercise demonstrated that the CIL had a very modest impact on residual land values and – in the Council's view – therefore demonstrated that the proposed rates passed a broad test of reasonableness.

This was not raised as a significant issue during the examination and it was not specifically requested that the residual land values be compared to the sites' existing use values. However, this exercise could be completed should you be minded to accept it.

4. The content of the Regulation 123 list

Comments have been made on the Regulation 123 list. Given that this is a matter that is not to be considered within the Examination, it would be useful to confirm that his views on the content of the Regulation 123 have not in any way influenced the decision on the way forward. The Council acknowledge the benefits of having a robust list in place at the time when CIL collections commence and are committed to ensuring a robust procedure of prioritisation of infrastructure projects.

5. Perceived complexity of the charging schedule

It is considered that the number of zones is a matter of judgement for the charging authority and the administration of the charging zones is a matter which will be considered by Officers. RBKC is unusual, perhaps uniquely so, in terms of the wide variation in sales values between different parts of the Borough and this is reflected in the number of proposed CIL zones. Again, this matter was discussed at the public examination and a full explanation was given as to why the approach had been taken.

Conclusions

The options proposed by your letter of 27 June are not acceptable to this Council. The approach taken in the examination of this Borough's DCS is considerably out of step with the approach adopted in other CIL examinations in London and it would be inappropriate to reject the DCS without giving the Council an opportunity to provide additional information and context which may assist.

We would therefore like to provide you with the opportunity to withdraw your letter. We must insist that the examination remains open to allow the outstanding matters to be resolved. If this does not happen, the Council will have no alternative but to consider other avenues, including legal action.

We would be grateful for your timely confirmation on this matter.

Yours sincerely,

A handwritten signature in black ink that reads "Jonathan Bore". The signature is written in a cursive style with a large initial 'J' and 'B'.

Jonathan Bore
Executive Director Planning and Borough Development

cc. Mary Travers, Director (Plans), Planning Inspectorate.
LeVerne Parker, Chief Solicitor, Royal Borough of Kensington and Chelsea