

## **Cover note to the Leading Counsel's opinion on Community Infrastructure Levy – Payments In Kind**

1. Following the release of further evidence documents by the borough for consultation, TfL/GLA instructed Leading Counsel to examine the opinion of William Upton on the Council's ability to accept in-kind infrastructure provision instead of CIL payments. This is attached for your consideration.
2. The Council stated in the Supplementary Evidence (Section 3) document that it intends to accept in-kind CIL payments in line with CIL Regulations 73 and 74. It also stated that William Upton's Opinion confirms that there is 'considerable scope for in-kind infrastructure payments to be made, even if the stricter interpretation of regulation 73A is adopted' (Para 3.4 of Supplementary Evidence).
3. As part of the consultation process, developers have put forward representations proposing that in-kind CIL payments are inappropriate for delivering on-site social infrastructure under Regulation 73 of the CIL Regulations.
4. William Upton provided an alternative approach to the Regulation 73A(7) difficulty suggesting that if two separate planning applications were made, one for the main development and the other for development of necessary infrastructure, then a CIL payment in-kind could be accepted on the latter. He also argues that the provision of infrastructure on strategic sites may have a dual purpose:
  - a. To make development acceptable in planning terms;
  - b. To provide infrastructure to serve the wider area.

He argues that the CIL payment for the latter element of infrastructure delivery can be in the form of in-kind provision.

William Upton also argues that if an item of infrastructure is identified in the Council's Regulation 123 list, and therefore can be paid for out of the borough CIL receipts, then, strictly speaking, the specific item of infrastructure is not necessary to make the development acceptable in planning terms. Hence, it can be paid for either in cash or through an in-kind provision.

5. In his Opinion, Paul Brown QC goes through the reasons why he does not consider William Upton's interpretation of the CIL Regulations 73 and 73A to be correct. He considers that the actual wording of the Regulations do not permit such a facilitative approach in determining whether an in-kind CIL payment is allowable.

6. In TfL/GLA's view this legal point is unlikely to affect the specific TfL/GLA issues in North Docklands; but it could have an impact on the overall viability of development across the borough including Docklands. Given the current wording of the Regulations, TfL/GLA wish to highlight the legal difficulties that exist in relation to payments in kind.

TfL/GLA

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