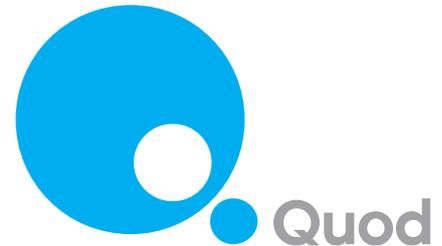


our ref: TD/Q30311
email: tom.dobson@quod.com
date: 12 September 2014



Anne-Marie Berni
CIL Consultation
Infrastructure Planning Team
London Borough of Tower Hamlets
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E14 2BG

Dear Anne-Marie,

London Borough of Tower Hamlets Community Infrastructure Levy: Consultation on Additional Information Required by the Examiner

Introduction

I am writing on behalf of the Berkeley Group in response to the additional information produced by the Council as requested by the LBTH CIL Examiner following the adjournment of the CIL Examination in Public in May 2014.

As you will be aware the Berkeley Group responded to the Preliminary and Draft Charging Schedules and to the questions produced by the Examiner to inform the examination. The focus of these responses was on large strategic sites which require significant investment in on site infrastructure and the implications for the delivery of affordable housing of the Council's proposed residential CIL rates for such sites, particularly those in the higher residential charging zones.

The issues raised go to the heart of the questions raised by the Examiner. We would like to take this opportunity to re-iterate our concerns about the risk to the delivery of such sites and respond to further evidence submitted by the Council, notably that in relation to 'in kind' delivery of infrastructure.

In our experience the delivery of Affordable Housing remains a strong priority for the Borough and the Strategic Development Committee and if its delivery is reduced by an inappropriate CIL rate it is likely to have a very significant and immediate impact on planning decision making in the Borough.

Development Targets and Opportunity Areas

As noted in our previous submission, the LBTH Local Plan is particularly dependent on large sites to secure the delivery of its targets. This relates not only to the delivery of housing targets but also the delivery of social infrastructure.

The Council's own additional evidence (paragraph 2.8) demonstrates that the 20 strategic sites account for approximately 43% of housing capacity in the Council's SHLAA. In this context our view is that it is somewhat academic as to whether any individual site allocation is critical to the delivery of the Local Plan, if the evidence suggests that there is a threat to the delivery of several of these sites – as the Council's further viability evidence suggests - this clearly puts at risk the delivery of plan targets as a whole.

Not only however does it put at risk housing delivery, but also the main items of infrastructure in the Plan. As the Council made clear at the Examination in Public (EIP) into the Managing Development Document DPD, it has very little land of its own with the capacity to deliver large items of strategic infrastructure, particularly schools, and therefore relies on the delivery of privately owned sites to achieve the Council's infrastructure targets.

It is also clear that the increased demand for this infrastructure is not only generated by this new development but by background growth of LBTH's existing resident population (as evidenced by recent GLA projections). The strategic sites are therefore required to support infrastructure irrespective of housing delivery on those particular sites. If the proposed CIL rate affects viability of those sites it will not only affect the delivery of housing (and affordable housing) targets but also more fundamentally the delivery of key infrastructure.

Impacts of Infrastructure Requirements on Viability & In Kind Payments

We note that the Council has undertaken further viability work in relation to three of the strategic sites: Bishopsgate Goodsyard, Westferry Printworks, and Wood Wharf.

These sites display a series of characteristics common to many of the strategic sites in the Borough, notably that they are required to provide on site infrastructure, the type of development is likely to have a lower net to gross ratio, they have abnormal development costs, and they are long term phased developments. Other sites included in the MDDPD, including Berkeley's London Dock site have similar characteristics.

Table 4 of the additional consultation document demonstrates that all of these sites would be unviable with 35% affordable housing, full CIL as proposed in the Draft Charging Schedule and the required infrastructure on site. LBTH suggests, however, that it wishes to retain the proposed rates principally because it regards affordable housing as negotiable and that CIL is a low proportion of development value. This suggests an implicit assumption that affordable housing delivery will be reduced although the extent to which this will happen does not appear to be quantified.

The Council also seeks to use 'In-Kind' infrastructure contribution towards CIL as a 'safety valve' for those sites on which on site infrastructure provision is required. Effectively, the Council is saying that if, for example, you are required to provide a school on site, that may be considered as a contribution towards CIL where that goes beyond the immediate requirements to mitigate the impacts of the children living in the development.

As the Council notes a number of stakeholders, including the Berkeley Group, have responded to previous consultation on this issue by pointing out that the nature of the CIL regulations in relation to these issues means that such an approach would be very difficult to achieve in practice. In response to this, the Council has sought Counsel's advice and also contacted the Department of Communities and Local Government.

The Counsel's advice and e mail from DCLG do not provide us with the confidence that Regulations 73, 73A, 73B and 74 can be used in the way suggested by the Council. The advice seems to suggest that infrastructure is only 'necessary' in planning terms (and therefore not eligible to be used as an in kind contribution) to the extent that it is necessary to mitigate the impacts of the development. However, in the case of the identified strategic sites it is necessary to meet the specific policy requirements in the Adopted Plan. Whilst there may be a legal debate to be had over the 'definition' of necessity, it is apparent that there remains significant uncertainty over this point and it would be open to legal (including third party) challenge.

Counsel's advice then goes on to suggest that the difficulties of the necessity test might be avoided by submitting two separate planning applications, one for infrastructure and one for the main development. Berkeley Group (St. George) has recently had a planning application approved for the London Dock site, which includes a Secondary School. Their experience is that, in practice, on a high density site it is very difficult to separate an item of infrastructure from the wider development in that they share access and basements and that triggers for delivery and mitigation are directly linked to the wider phasing of the development.

This is further complicated by the requirement to undertake an Environmental Impact Assessment (EIA) for developments of this scale, and the clear case law that suggests that one should not 'salami slice' proposals as this undermines the integrity of the EIA.

Lastly the advice from Counsel and DCLG makes no reference to either EU State Aid restrictions nor to EU Public Works Directives. These place further legal risk of third party challenge to a developer procuring and delivering infrastructure on-site in lieu of CIL, which might be necessary, for example where a facility were an integral part of a larger mixed use building.

For these reasons, our view remains that the 'In Kind' contributions route would involve significant risk to developers and the Council and in practice would be difficult to use. Rather than suggest artificial and complex procedures, such as trying to separate planning applications in order to circumvent the regulations, it would be more appropriate for the Council to set proposed CIL rates at a level that reflects the infrastructure costs on-site.

We note that at Paragraph 5.45 (Table 6) of the additional information document the Council has calculated what the equivalent CIL would have been for the Wood Wharf development (which has been subject to a recent independently reviewed viability assessment) if the 'off site' Section 106 contribution were to be translated to a CIL rate. For housing, this suggests a rate of £56.82 per square metre. In our view the most appropriate CIL charge for strategic sites is zero but that if the Council wished to secure a base level of payment this is a more appropriate general level for strategic sites that are required to provide on site infrastructure.

Conclusion

In summary, we remain concerned that the Council's own evidence suggests that for large and strategic sites the proposed CIL rates for residential development will put at risk the delivery of the Local Plan, including housing, affordable housing and on-site infrastructure.

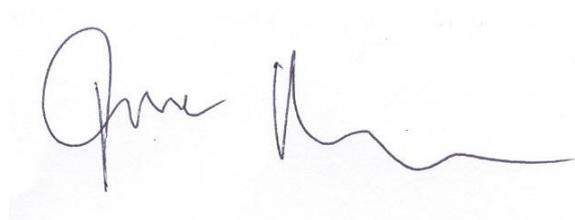
We disagree with the Council's suggestion that this, in part, can be mitigated by allowing for 'in kind' contributions because of the complexity of such an approach and the significant risk of legal challenge.

We would, therefore, respectfully request the Inspector to consider setting a zero or lower rate for strategic sites, possibly in line with those identified for Wood Wharf in the Council's own evidence.

We believe that it would be helpful if this further evidence were subject of an additional hearing, would like to be notified of such a hearing and reserve our right to attend.

Please do not hesitate to contact me if you require further information.

Yours sincerely,



Tom Dobson

Director

cc:

Judith Salomon (St. George)

Harry Lewis (Berkeley Homes – South-East London)