

GREATER LONDON AUTHORITY
Development, Enterprise and Environment

CIL Consultation
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Our ref:
Your ref:
Date: 10 March 2014

Dear Sir/Madam,

Planning Act 2008
London Borough of Tower Hamlets Community Infrastructure Levy – Proposed
Modifications to Revised Draft Charging Schedule

I am writing with the representations of the Mayor of London with regard to your Borough's proposed modifications to your revised draft Community Infrastructure Levy (CIL) charging schedule (RDCS).

As you know, the Mayor approved his own charging schedule in March 2012 and started charging his CIL from 1 April of that year. Under regulation 14(3) of the Community Infrastructure Levy Regulations 2010 (as amended), London boroughs are required to have regard to the rates set by the Mayor.

As part of this process, we also take account of the Mayor's policy on the use of planning obligations to help fund Crossrail which, as you know, affects that part of your Borough that falls within the Central London Contribution Area. This is shown in the map in Annex 1 to the Mayor's supplementary planning guidance on "Use of Planning Obligations in the Funding of Crossrail, and the Mayoral Community Infrastructure Levy" – in short, those parts of the Central Activities Zone and of an area within a 1 kilometre radius of Liverpool Street station that fall within the Borough boundary. It also affects the entirety of the Isle of Dogs Contribution Area shown in Annex 2 of the same document.

The Mayor also considers the CIL proposals of the London Boroughs as they might affect the economic viability of development across their area. This is part of the test set out in CIL regulation 14(1)) in order to ensure that the objectives and detailed policies in the London Plan are not put at risk (the London Plan forming part of the development plan across Greater London – see section 38 of the Planning and Compulsory Purchase Act 2004), in accordance with paragraphs 4, 8

and 21 of the statutory guidance on the CIL published by the Government under section 221 of the Planning Act 2008.

The Mayor's role in borough CIL-setting is explained in more detail in the London Plan supplementary planning guidance on "Use of Planning Obligations in the Funding of Crossrail, and the Mayoral Community Infrastructure Levy".

The Mayor has carefully considered the proposed modifications to the revised draft charging schedule and the CIL rates it proposes. For the reasons set out below, he considers that the rates proposed do not adequately take account of the rates set by the Mayor, and that in putting them forward the Borough has failed to apply properly the test set out in regulation 14(1).

For these reasons he would urge the Borough to withdraw the revised draft charging schedule (RDCS). If it chooses not to do so, he intends to be represented at the public examination of the draft schedule and will ask the Examiner to reject the RDCS.

This letter sets out the basis for the Mayor's objection. It does so by reference to the relevant matters which will be the subject of the public examination:

- Whether in setting its proposed CIL rates, the Borough has properly applied the "appropriate balance" test set out in regulation 14(1)
- Whether in setting its proposed rates, the Borough has properly applied the requirement in regulation 14(3) to take into account rates set by the Mayor in considering the potential effects of imposition of CIL on the economic viability of development.

The regulation 14(1) test

The Council has to show that it has struck an appropriate balance between, the desirability of using CIL to fund infrastructure required to support the development of its area, and the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area. The statutory guidance applies the principles set out in the National Planning Policy Framework, using the likely effects on delivery of the development plan as a means of striking this balance, and demonstrating that it has been struck (see NPPF paragraphs 8 and 29). The Mayor considers that the Borough has failed to address this test adequately.

The Borough has failed to give sufficient weight to the importance of Crossrail. The London Plan identifies this as the Mayor's "top strategic transport priority for London" (Policy 6.4), a priority confirmed in policies 6.5 and 8.2. It is worth noting that there are intended to be two Crossrail stations in Tower Hamlets (Whitechapel, which will help underpin development of the City Fringe opportunity area, and Canary Wharf which will be critical to realisation of the potential of the Isle of Dogs as without it there will be limited scope for additional commercial development). The City Fringe part of the Borough will also benefit from the station at Liverpool Street.

The Mayor has in place arrangements for the use of planning obligations to seek contributions towards the cost of Crossrail, the basis for which is set out in London Plan policies 6.5 and 8.2. These arrangements were introduced in accordance with a funding agreement between the Mayor, Transport for London and ministers, and approved by Parliament. The CIL Regulations also recognise the importance of the policy, as it is the sole exception from the provisions of regulation 123 scaling back the use of planning obligations following introduction of the CIL.

As Policy 6.5 suggests, the details of the Crossrail contributions policy are set out in the supplementary guidance referred to earlier. Uniquely, the part of the guidance document dealing with planning obligations was scrutinised alongside alterations to the London Plan to introduce the policy at an examination in public in December 2009 (at which Tower Hamlets attended), and the Mayor accepted a number of suggestions for changes to the document made by the Panel. Although the guidance is not formally part of the development plan, it is soundly based on formal policy and the way it was prepared coupled with the extent of ministerial support means that it should be given particular weight. It was brought forward to give effect to national policy, as the funding arrangements for Crossrail (including this policy) were laid before Parliament during passage of what became the Business Rates Supplements Act 2009.

In responding to the examination in public, the Mayor acknowledged that following introduction of the Community Infrastructure Levy, he would ensure that developers did not effectively make the same contribution twice under both the Mayor's CIL and s106. He has sought to do this by treating the CIL as a "credit" towards the planning obligation contribution calculated in accordance with the supplementary planning guidance (SPG) in those parts of London where the latter applied. In Tower Hamlets these are that part of the Central London contribution area shown in Annex 1 of the SPG, the Isle of Dogs contribution area shown in Annex 2 and an area within a 1 kilometre radius of Whitechapel station (see Annex 4). The practical result is that in these areas, where the Mayoral CIL payable is less than the amount payable under the planning obligation policy a "top up" will be sought representing the difference between the two amounts.

Tower Hamlets' viability consultants propose rate levels that allow for collection of only part of the Mayor's Crossrail S106. It follows that if the Crossrail S106 "top-up" was collected at the full rate this would require a reduction in the proposed rates if development is not to be put at risk. To avoid this, the Borough is proposing an arbitrary reduction in the Crossrail "top-up" on the North Dockland Office market. It is possible to deduce from the Tower Hamlets' CIL Infrastructure Planning and Funding Gap Report that North Docklands is estimated to deliver almost 50% of all commercial development subject to Crossrail S106 policy in the borough between 2014 and 2026.

The fact that the Crossrail "top-up" is restricted on office property use in the North Docklands area is likely to have a significant effect on the amount of Mayor's S106 collected from the borough and on the overall funding of Crossrail. In practical terms this means either that there would be an unfair further burden on other parts

of London, or that other strategic transport projects in Tower Hamlets being cancelled or delayed to help make up the gap.

Specifically, Tower Hamlets viability consultants identified that office development in the north Docklands area could support a maximum CIL rate of £125/sqm, after allowing for the Mayoral CIL and a buffer of 25% for site-specific issues. Given the proposed borough CIL charge of £50/sqm, the Crossrail S106 "top-up" on office development in the area will be restricted to £75/sqm. This effectively means that the borough is proposing a 50% reduction in the "top-up" (full "top-up" is £155/sqm).

The restriction is likely to have a significant effect on the amount of Mayor's S106 collected from the borough and on the overall funding of Crossrail. A conservative estimate of the loss, based on the Wood Wharf development alone, is between £22m-£30m. This is also indicated in paragraph 4 of Leading Counsel's advice attached to this letter.

It is in this context that one should judge the borough's comments in paragraph 3.11 of the 'Tower Hamlets Consultation Statement, February 2014' (ED3.2). The borough states that in mixed use scenarios the Mayor would not have stood to receive 100% of the S106 "top up" in any event because of the offsetting of CIL. In a simple office and residential mixed use scheme it would require the office content to be less than 18.42% before the S106 payment for the offices was offset by the CIL on the entire floor space (using £190 psm {office S106} and £35psm {Mayors CIL offices and residential}.) So any mixed use scheme with a sizable office content is likely to be one where the Mayor has a S106 top up to protect. Where the commercial content is less than 18.42% the Borough will be achieving substantial CIL assessed against the residential content.

The Mayor submits that in taking this approach, the Borough has incorrectly applied the test in regulation 14(1) by disregarding a policy in the development plan which has a vital bearing on the question of the potential effects (taken as a whole) of the proposed CIL rates on economic viability.

It has failed to show how this approach could contribute towards the implementation of relevant development plan policies (paragraph 8 of the statutory guidance). It has brought forward rates which could only be set by compromising delivery of London Plan policies 6.5 and 8.2. The recent reports by Examiners considering draft schedules put forward by Mid Devon District Council and the Greater Norwich Development Partnership support the Mayor's view that this approach does not conform with CIL regulation 14.

The Mayor further submits that the correct approach in applying CIL regulation 14 is to start with the policies in the development plan, including those for affordable housing and other calls on development, and assess the effects of proposed CIL rates over and above these. This view is supported by paragraph 29 of the statutory guidance. The Borough has not done this; rather it has treated the "Crossrail top-up" as the residual, to be reduced to accommodate their CIL proposals regardless of the extent of congestion a development might cause on the London rail network (the "harm" the Mayor's planning obligations policy is intended to address, and

which is a factor in making relevant development acceptable in planning terms). The Borough has therefore failed to apply the regulation 14 test properly.

It is worth noting that the reduction in "Crossrail top-up" is wholly arbitrary. Under LBTH's original proposals, the reduction would have been 70%. Under the proposed modifications, it would be 50% in the North Docklands area. In neither case has any explanation been given of the basis on which the proposed reduction has been determined. This approach is contrary to the spirit encouraged by paragraph 2:2:2:8 of the statutory guidance.

It is also worth noting in respect of affordable housing provision that the Council does not appear to have had due regard to its overall strategic target for affordable housing of 50%, as set out in Core Strategy SP02. This policy identifies that the 50% target is to be achieved by: securing affordable housing via planning obligations in the range 35-50% of units (subject to viability); securing additional affordable homes from public sector initiatives with housing associations; and bringing long-term vacant properties back into use. Whilst some consideration has been given to the impact on affordable housing supply via planning obligations this does not appear to be the case with supply from public sector initiatives with housing associations. In particular many such affordable housing and estate regeneration schemes rely on an element of internal cross-subsidy from private sale units. Moreover the inclusion of an element of cross-subsidy is often necessary to demonstrate that schemes offer value for money when housing associations are bidding for public grant for such schemes i.e. a negative impact on the level of cross-subsidy may in turn reduce or negate public grant for such schemes. The Council's failure to assess the impact of the proposed charging rate on the supply of affordable housing from public sector initiatives with housing associations constitutes a failure to have due regard to Core Strategy SP02 and therefore to comply with regulation 14.

In summary, the Mayor considers that Tower Hamlets has clearly failed to strike the balance required by regulation 14. The RDCS should be either withdrawn or rejected on this ground.

Regulation 14(3)

Regulation 14(3) requires Boroughs to take account of CIL rates set by the Mayor in setting their own. The Borough has failed to do so.

It is common practice in setting CIL rates to allow a buffer between the rates proposed and the maximum that could be sought. This reduces the scope for "shocking" the development market and gives some headroom for exceptional costs in particular cases. As at October 2012 the Borough's then viability study stated that typically a reduction of 30%-50% is allowed as a buffer. In the August 2013 updated study the range is given as "circa 20%-50%". In Appendix 1 of the updates to viability appraisals following RDCS consultation, published January 2014, in Section 3.1 (pg7) the buffer is now given as 25%. No evidence is provided to support the level of discount and no explanation is given as to why it is thought appropriate to reduce the buffer.

No evidence is put forward for why the kind of costs and other factors intended to be covered by the buffer should differ so markedly from one part of the Borough to another (indeed the use of percentages to cover factors probably unlikely to vary much in actual cost terms from place to place could be questioned). Oddly perhaps, the application of a percentage after deduction of the Mayor's CIL means that the lowest buffer appears to have been allowed for in places where the viability fundamentals are at their weakest. We can see no explicit consideration of whether the buffer percentages are appropriate to the circumstances found at the strategic sites.

Furthermore , using City Fringe offices as an example the current Viability Evidence sets the maximum potential CIL by reference to the "current use value 2 " calculation whereas the previous evidence adopted the more cautious " current use value 3" calculation. No explanation is given for this change of approach which increases the risk that that the adopted rates will make development unviable.

Conclusions

The Mayor considers that the Borough has failed to have proper regard to the Mayoral CIL in striking the balance required by regulation 14. He also considers that the flaws identified here undermine the value of the Viability Study as appropriate available evidence. The Mayor has sought the advice of Leading Counsel on these matters and his opinion is attached as an appendix to this letter.

We would be glad to discuss these issues with you further, if you consider that would be helpful. In the meantime I would be grateful if you would note our request to be heard at the public examination and to be notified of the various steps outlined in paragraphs 5.1 and 5.2 of your Statement of Representation Procedure (October 2013).

Yours faithfully

**LONDON BOROUGH OF TOWER HAMLETS
COMMUNITY INFRASTRUCTURE LEVY – PROPOSED MODIFICATIONS TO THE REVISED DRAFT
CHARGING SCHEDULE**

OPINION

1. I have been asked to advise the London Mayor on the extent to which the proposed modifications to the London Borough of Tower Hamlet’s draft Charging Schedule for its Community Infrastructure Levy satisfy the requirements of the Regulation 14 of the Community Infrastructure Regulations. In particular, the Mayor is concerned that the charging rates proposed by LBTH are premised on a reduction in the amount which would be collected under the policies of the London Plan relating to the use of planning obligations for funding Crossrail.
2. For present purposes,¹ regulation 14 provides as follows:

“14. (1) In setting rates (including differential rates) in a charging schedule, a charging authority must aim to strike what appears to the charging authority to be an appropriate balance between—

- (a) the desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and
- (b) the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area.

¹ Regulation 14(1) has since been amended by deleting the words “aim to” and “what appears to the charging authority to be”. However, the transitional arrangements provide that these amendments do not apply to where a draft charging schedule was published before the Regulations came into force.

(2) ...

(3) In having regard to the potential effects of the imposition of CIL on the economic viability of development (in accordance with paragraph (1)(b)), a London borough council must take into account the rates set by the Mayor."

3. I note the following points about regulation 14 in the context the London Plan in general, and Crossrail in particular:

- a. Regulation 14(3) expressly recognises the priority which London boroughs are required to give to the Mayoral CIL, the purpose of which is to fund Crossrail;
- b. In this respect, the CIL Regulations mirror the priority which is accorded to the provisions of the London Plan as compared with the development plan documents prepared by the Boroughs themselves. In particular, borough plan DPDs are required to be in conformity with the London Plan;
- c. Policy 6.4 of the London Plan identifies Crossrail as the Mayor's "top strategic transport priority". This status is confirmed in Policies 6.5 and 8.2 of the London Plan. These policies form part of the development plan for each of the London Boroughs, including LBTH;
- d. Crossrail is not merely a matter of London-wide policy. The funding arrangements for it were determined by Act of Parliament, reflecting its significance nationally;
- e. The Mayor has adopted Supplementary Planning Guidance ("SPG") on the funding of Crossrail through section 106 contributions. Unusually, this guidance was the subject of examination by the inspector considering the alterations to the London Plan in 2009;
- f. The SPG explicitly takes into account the Mayor's own CIL for funding Crossrail. In particular, in order to avoid "double recovery", for those developments which would fall within the policy requirement to make a section 106 contribution towards the cost of Crossrail, any liability to CIL is deducted from the section 106 contribution which will be sought;

- g. The Mayoral CIL thus recognises the “desirability of funding from CIL” part of the actual costs of constructing Crossrail. London Plan policies 6.4, 6.5 and 8.2 are premised on and give effect to the need to obtain additional funding through section106 contributions;
 - h. Crossrail is, however, not only infrastructure which is it desirable to fund through CIL: it is also infrastructure which is critical to unlocking the development potential of London. Of particular relevance to Tower Hamlets, it is key to unlocking the potential of areas such as Whitechapel, Canary Wharf and the Isle of Dogs.
4. It is against this backdrop that LBTH has produced its draft Charging Schedule. Under the charging rates originally proposed, LBTH’s own consultants candidly admitted that, within the areas covered by the Mayor’s SPG, development would only be viable if there was a 70% reduction in the “top-up” payments for Crossrail. While LBTH’s proposed amendments significantly reduce the original charging rates, para 3.10 of LBTH’s Consultation Statement makes it clear that LBTH intends to “split” the “viable amount” equally between the Crossrail SPG payment and the LBTH CIL, with the result that (as and LBTH’s own documentation states) the revised rates would still require a 50% reduction in the “top-up” payment which would be collected under the Crossrail SPG in the North Docklands area.² I am instructed that this is likely to result in a shortfall of at least £22-£30 million pounds.
5. Logically, one of three consequences must flow from adoption of the proposed amendments to LBTH’s draft Charging Schedule:
- a. There will be a shortfall in the funding for Crossrail, with adverse consequences for the delivery of Crossrail itself;
 - b. There will be a shortfall in the funding of Crossrail, which the Mayor will only be able to meet by taking funding from other infrastructure projects;

² See Examination Document ED5.1: “How the Crossrail SPG has been accounted for in respect of Office development in the North Docklands”

- c. Crossrail will continue to be funded in accordance with the Mayor's Supplementary Guidance, but this will adversely affect the viability of developments within the CAZ and the Isle of Dogs Contribution Area.
6. In my view, none of these outcomes is compatible with LBTH's duties under regulation 14.
- a. The development plan for London as a whole, and LBTH in particular, recognises strategic importance of Crossrail. Critically, Crossrail is not simply infrastructure which is desirable in its own right: it is critical to unlocking the development potential of significant parts of LBTH. It would be fundamentally inconsistent for LBTH to adopt a charging schedule which undermined a key strategic proposal of the development plan for its own area. I am not aware of any analysis by LBTH of the consequences (either for London as a whole, or for the Borough itself) of an inability to deliver Crossrail because of a shortfall in funding;
 - b. Although, given the wider importance of Crossrail, the other sources of funding available for it, and the fact that Crossrail is now under construction, LBTH would doubtless argue that the scenario suggested in (a) above is unlikely, this does not remove the conflict between the draft charging schedule and the development plan for the area. In particular, the London Plan policies specifically deal with the funding arrangements for Crossrail. Those policies have been tested at public inquiry and form part of the development plan for LBTH. In any event, insofar as LBTH's proposed charging rates are based on the premise that the Mayor will have to "rob Peter to pay Paul" there does not appear to have been any analysis by LBTH of the implications of this. It is difficult to see how LBTH could have reached a view on the implications of being unable to fund the other infrastructure from which any shortfall for Crossrail would have to be taken, without first knowing what that infrastructure was, and what would be the consequences if it was not provided. Without that information, it is not possible for LBTH to carry out the regulation 14(1) balancing exercise;
 - c. Conversely, I am not aware of any analysis by LBTH of the consequences if the full section 106 contribution for Crossrail continues to be required, with the result that a significant proportion of development within LBTH's area becomes unviable. Indeed,

LBTH's proposed charging rates are clearly not premised on that outcome. There is consequently no indication of how much development would be affected by LBTH's own CIL if the London Plan policies on the funding of Crossrail continue to be applied in full. In my view, it is simply not possible for LBTH to carry out the balancing exercise required by regulation 14(1) unless and until it has some idea of the extent to which development within its area would be rendered unviable.

7. In short, it cannot seriously be LBTH's case that it could adopt a charging schedule which would prevent delivery of Crossrail. However, if that is not LBTH's case, there has been no analysis by LBTH of whether its charging schedule would result in either the diversion of funding from other strategically important infrastructure (and the consequences if this were to happen), or a reduction in the viability of development within the Borough (and the extent to which this would affect the viability of development in the area as a whole). For these reasons alone, it is difficult to see how LBTH can claim to have "struck an appropriate balance" for the purposes of regulation 14(1).
8. Further, although it is for the charging authority to determine the "appropriate balance" under regulation 14(1), that assessment must be carried out against the backdrop of the relevant development plan policies. Certainly, this was the approach taken by the Examiner considering Mid-Devon District Council's draft charging schedule. At para 12 of his Report dated 20 February 2013, the Examiner observed that:

"The [Development Plan] policies ... will remain the starting point in the consideration of any planning application. The key test is therefore whether or not the assumptions upon which the proposed level of CIL are based would undermine the delivery of the DP targets ..."

9. Those comments were directed specifically at the fact that, although the Mid-Devon Core Strategy set a target for 35% affordable housing on sites within urban areas, the draft charging schedule assumed a figure of only 22.5% in its calculations. The Examiner rejected that approach, concluding that the charging schedule should have been based on "the foundation provided by the adopted DP".³

³ Para 17

10. I agree with that analysis. In my view, the same principle applies to other development plan policies relating to infrastructure, such as Crossrail, which is necessary to mitigate the impact of new development.⁴ It would be perverse for a charging authority to produce a charging schedule which undermined the strategic policies of its own development plan.

11. In essence, LBTH's approach treats the Crossrail section 106 policy as if it were a minor, and therefore dispensable, component of the London Plan. In view of the national significance of Crossrail, and the priority given to both the London Plan, I do not consider it is open to LBTH to treat the Crossrail policies of the London Plan in this way. Rather, as set out in the Mayor's letter of 4 June 2013, objecting to LBTH's original proposals, the correct approach (supported by paragraph 29 of the CLG guidance) is to start with the policies of the development plan, and assume that these are themselves "development costs" which should be taken into account when assessing the impact of CIL on viability.

12. In addition, those instructing have pointed out that, in the period between publication of LBTH's original proposals and the recently proposed amendments, there has been a significant shift in the assumptions on which the charging rates are based. In particular, the original viability study indicated that there should be a typical reduction in the order of 30-50% to reduce the scope for "shocking" the market. In the most recently published updates to the viability appraisal, the suggested buffer is given as 25%. Similarly, the most recent assessment sets the maximum potential CIL by reference to "current use value 2" calculations, whereas the previous evidence relied on the more cautious "current use value 3" calculation. These are significant changes, but no explanation is given for them. At the very least, I consider that the abandonment of the methodology previously relied upon calls for some explanation – especially when the more recent approach increases the risk that the proposed rates will make development unviable. Without any such explanation, there is simply no way of assessing the value of the latest viability study as appropriate available evidence.

⁴ Though I note that the Mayor has also expressed concerns about the extent to which LBTH's charging schedule takes account of its own affordable housing targets. The Mid-Devon Examiner's comments are directly relevant to that issue.

13. In the circumstances, I consider that the Mayor's objections to the LBTH CIL, as set out in its letter of 4 June 2013, remain valid.

5 March 2014