

Thomas Eggar LLP  
Belmont House Station Way  
Crawley West Sussex RH10 1JA

Telephone +44 (0)1293 742 700  
Facsimile +44 (0)1293 742 999  
DX no. 85715 Crawley

Community Infrastructure Levy  
Planning Policy  
Bath & North East Somerset Council  
PO Box 5006  
Bath  
BA1 1JG

[cil@bathnes.gov.uk](mailto:cil@bathnes.gov.uk)

**By Email and by Post**

Our ref: PPG/CD/KB/45119238  
Your ref:

9 September 2014

Dear Sirs

**Community Infrastructure Levy Regulations 2010 (as amended)  
Draft Charging Schedule consultation closing on 18 September 2014  
Response to Consultation on behalf of Asda Stores Limited**

We act for Asda Stores Limited ("Asda") and are writing on behalf of Asda to make representations in respect of the Council's Draft Charging Schedule (first review).

Under Regulation 14 of the Community Infrastructure Levy Regulations 2010 ("CIL Regulations") the Council's primary duty when setting the level of Community Infrastructure Levy ("CIL") charge is to strike an appropriate balance between the desirability of funding the cost of infrastructure required to support development from CIL and its potential effects on the economic viability of development.

In our view, the approach taken to assessing the Draft Charging Schedule does not achieve an appropriate balance between these two objectives.

We wish to object to the approach taken to assessing the Draft Charging Schedule on the following grounds:

1. The impact on policies enhancing economic performance;
2. the financial assumptions and viability assessments contained in the Council's Viability Study;
3. the proposal to split convenience and comparison retail development;
4. issues relating to State Aid; and
5. concerns about the Council's approach to setting CIL charges generally.

GA: 3833817\_1

## **1 The impact on policies enhancing economic performance**

We will not repeat the Council's strategic objectives contained in its Local Plan in full here, but in order to achieve its Vision and Overall Objectives, it will be important for the Council to set an appropriate CIL charge to encourage new development to come forward. An appropriate CIL charge will encourage new development and promote redevelopment to create employment and ensure a range of shopping choices for consumers and enhance the vitality and viability in district and local centres.

The proposed retail CIL rates would discourage larger retail developments and would not ensure that the relevant retail and employment aims of the Vision and Overall Objectives are met. This could have the effect of reducing the range, variety and choice of retail shopping and, if no redevelopment or regeneration schemes are put forward, then existing buildings are unlikely to be refurbished and re-used.

It is our view that if the retail charges set out in the Draft Charging Schedule are adopted, there will be several consequences across the Borough that will put the Council's ability to achieve its key objectives at risk. For example:

- All other forms of development will receive a significant subsidy at the expense of retail schemes; and
- There will be a corresponding disincentive (and market distortion accordingly) to investment in this sector of the local economy.

The Government is keen to encourage the creation of additional employment across the economy and the retail sector as a whole is one of the largest employers and the largest creator of new jobs at the present time as well as being one of the most dynamic and innovative sectors within the UK economy.

### Asda example 1

ASDA has a proven track record of investing in local communities and of creating jobs within these areas. For example, of the 123 colleagues recruited for the ASDA store in Tunbridge Wells, 76 colleagues (71%) were previously unemployed.

The supporting papers do not acknowledge this trend nor do they fully assess the role of retail within the national economy. They simply assert that large scale retail is performing stronger in comparison to the other aspects of the retail sector and accordingly, it implies that large scale retail establishments have the capacity to pay potentially very large sums of CIL, whereas the Town Centre comparison and small convenience retail rates are much lower.

Any CIL schedule that imposes a substantial CIL charge on superstores or supermarkets and a very low or nil rate on all other uses could effectively undermine the retail function of local and town centres, detracting from their viability and vitality as large scale retail developers would be discouraged by the imposition of CIL.

### Asda example 2

Asda stores regularly rejuvenate and regenerate existing centres, and the surrounding areas, and draw new shoppers to them, which benefits the existing retailers, and those who open stores in Asda-anchored centres in their wake. For example in 2006, Asda opened a store in Romford, transforming a derelict brownfield site through an extension of an existing

retail mall and creating 347 jobs. This helped to propel Romford into the top 50 UK retailing cities. Indeed, due to the success of the store in attracting more footfall to that part of the town's Primary Shopping Area, the local authority redrew the town centre boundary to include the edge of centre Asda store into the heart of the Romford town centre.

## **2 The financial assumptions and viability assessments contained in the Council's Viability Study**

We also have a number of concerns about the study BNP Paribas conducted in May 2014 (the "Viability Study").

The Viability Study contains retail development assumptions that in our view are inadequate as they do not make sufficient allowance for the costs involved in obtaining planning permission for a development scheme. The Viability Study also contains a number of inconsistencies within its financial assumptions.

By excluding the true cost of residual planning for a commercial development, the Council has underestimated the true cost of retail developments and artificially inflated the residual land values used for the financial viability models. This will, in turn, have inflated the amount of CIL proposed for these uses.

The Viability Study does make an allowance for residual s106 and s278 agreements, in addition to CIL, that may be borne by developers within retail. The s106 allowance is £50 per sqm, equating to an allowance of £100,000 for a 2000 sqm foodstore. We are concerned that this is rather a low allowance so we would urge the Council reconsider this.

Although the Council will not be able to pool section 106 contributions once CIL is adopted, the types of commonly pooled contributions tend not to make up a large proportion of the contributions sought from commercial schemes – which are usually focussed on site specific highways and access works, employment and training contributions, environmental mitigation works and other, site specific, requirements. This is demonstrated by the Council's draft Regulation 123 list, which makes it clear that any site specific green infrastructure or network improvements, not listed, that are needed to mitigate the impact of the development and to make it acceptable in planning terms, may still be required to be funded through section 106 and section 278 agreements.

Taking the example of a 2,000 sqm supermarket used in the Viability Report, this sized store would be expected to bear a CIL payment of £300,000 (£150 per sqm). The building costs would be £2,599,974 and in addition, this supermarket would potentially fund all of the following potential costs:

- demolition, remediation and on site highways works
- the cost of extending the Council's CCTV or public transport network to include the scheme (including the costs of creating new bus stops, real time information and providing new bus services to serve the site);
- monitoring costs of compliance with employment/apprenticeship schemes and travel plans;
- environmental off-set contributions to mitigate the loss of habitat or greenery caused by the scheme;
- The cost of any remediation and decontamination works to be carried out by the council on the developer's behalf;
- payments for town centre improvements intended to mitigate the impact of the

- development on the town centre or neighbouring areas; and
- the costs incurred by the Council of maintaining any site specific infrastructure required by the development.

To put this in context:

- the section 106 Contributions incurred in relation to a c.3,000 sqm food store in Ware, Hertfordshire amounted to £871,800. These sums related to bus service contributions; development of a community centre, nursery; education contributions; various highway safety improvements; youth service contribution; residents parking schemes and open space contribution. In addition to these Contributions, green travel plan contributions, monitoring fees and architectural lighting on pedestrian routes between the store and city centre were also incurred.
- the section 106 Contributions incurred in relation to a c.6,700 sqm food store in Newhaven, East Sussex amounted to £1,345,544. These sums related to contributions for improvements to and an extension of the local bus network; economic initiatives; contributions for relocating local habitats; improvement of recreational space; recycling contributions; residential and retail travel plan auditing; transportation and town centre contributions.

With this in mind, we again, suggest that the Council has significantly underestimated the impact of CIL on the viability of such developments and request that the underlying viability evidence be revised accordingly to reflect this and also to again address the present inconsistencies.

### **3 The proposal to split convenience and comparison retail development**

It is our view that the Council's proposal to maintain its application of differing CIL rates to 'comparison' and 'convenience' retail falls outside of the scope of the rate differentials permitted in the CIL regulations.

Clause 13(1) of the CIL Regulations states that a charging authority may set different rates for different zone in which development would be situated; and/or by reference to different intended uses of development within those zones and/or by reference to the size of those schemes.

While the CIL regulations do not expressly define 'use', they regularly adopt definitions from the planning system and other planning legislation (in particular the Town and Country Planning Act 1990 (as amended) and the Planning Act 2008). As the Use Classes Order is widely accepted to be the starting point for definitions of Use within the planning system, it is reasonable to expect that the CIL Regulations reflects those definitions.

It should be noted that Poole, Mid-Devon and Elmbridge Councils have withdrawn their proposals to charge large supermarkets a higher CIL rate than other retail development, on the grounds that this approach is potentially unlawful. Similarly, New Forest District Council has also had its "large supermarket" rate struck out at Inquiry, as the Inspector held that the threshold at which it had been set had not been sufficiently justified by the viability evidence provided.

In addition, the Council's proposal to distinguish 'comparison' and 'convenience' retail also poses practical problems for retail developers and the Council themselves in assessing the charge, as most supermarkets and superstores contain a mix of convenience and comparison floorspace. The Council's current proposals will potentially result in two different

CIL rates being charged for floorspace within the same building or development. Such an approach adds undue complexity to the CIL calculations.

#### **4 State Aid**

We wish to bring it to your attention that there will be EU State Aid issues arising out of the setting of differential rates for different types of commercial entity within the same use class. Introducing such differential rates confers a selective economic advantage on certain retailers depending on the size of the shop they operate out of, or their type of business. For example, setting the levy for comparison retail schemes at a lower rate than an equivalent convenience retail scheme provides an economic advantage to comparison retailers. Alternatively, basing rate differentials on the size of a store favours smaller retailers over their larger competitors.

As far as we are aware, the UK government has not applied for a block exemption for CIL. CIL charges do not form part of the UK's taxation system and there does not appear to be an exemption in place to cover any State Aid issues that may arise. With this in mind, we would be grateful if the Council adopted a flat levy rate for comparable sectors of the economy/use classes or, if it is not prepared to do so, providing an explanation as to why State Aid issues are not engaged by the setting of differential rates within use classes to the Inspector at the Inquiry.

#### **ASDA's SUGGESTIONS**

##### **1. Instalment Policy**

We note that the Council intends to introduce a draft instalments policy for CIL alongside its Draft Charging Schedule. We endorse the Council's decision to introduce such a policy because managing cash flow during development is often key in determining whether a scheme will be successfully delivered. However we suggest that the Council adopts a policy allowing for instalments to be paid below £35,000 as well as above as this will manage cash flow further.

##### **2. Exceptional Circumstances Relief**

It is unclear whether the Council will adopt this relief. We would encourage the Council to do so, as the Council will have the flexibility to allow strategic or desirable, but unprofitable, development schemes to come forward, by exempting them from the CIL charge or reducing it in certain circumstances.

##### **3. Provision of Infrastructure as Payment in Kind**

As stated above, the latest set of amendments to the CIL Regulations have now made it lawful for authorities CIL contributions to be paid by the provision of infrastructure in certain circumstances. Given that the provision of infrastructure is often key to unlocking unimplemented planning permissions and enabling developments, we would urge the Council seriously to consider adopting a policy to allow payment in kind in this manner.

#### **CONCLUSION**

For these reasons, we would ask that the Council undertakes a rethink of its position and substantially alters its Charging Schedule in so far as it relates to retail development.

Accordingly, we would request that the Council:

- Revisits its viability assessments for retail development, to address the concerns set out above;
- Adopt an instalments policy for payments under £35,000 as well as above;
- Adopts an Exceptional Circumstances Relief policy; and
- Considers the allowing developers to pay their CIL Liability through the provision of infrastructure;

Yours faithfully

A black rectangular redaction box covering the signature area.

**Thomas Eggar LLP**

Email: [carl.dyer@thomaseggar.com](mailto:carl.dyer@thomaseggar.com)  
Direct Dial: 01293 742888