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15th March 2021

Dear Sir,

REF: TEWKESBURY BOROUGH PLAN (TBP) EXAMINATION – SECTION 106 PLANNING OBLIGATIONS AND DEVELOPMENT VIABILITY

The purpose of this letter is to address developer contributions, the Tewkesbury Borough Council ("TBC") Community Infrastructure Levy ("CIL"), and development viability, following on from your letter to TBC on these matters dated 6th February 2021, and the subsequent response received dated 5th March 2021. This letter has been prepared by EFM to support representations by Ridge and Partners (on behalf of Bloor Homes Western) to the Review of the Tewkesbury Borough Plan

This letter will comment on two main areas: firstly, does the updated information adequately assess the impact of current practice in relation to higher Section 106 contributions? Second, in light of the new viability information, are there any implications for the policies in the submitted TBP? In relation to question two, this letter will also discuss the consequences to the deliverability of the TBP of the change in tack in the approach to Education development mitigation.

To first address the question of how Education development mitigation is to be funded:

Education Related Development Mitigation

The TBC CIL charge itself was established by looking at local evidence regarding infrastructure requirements and the impact of the levy on the viability of development. The infrastructure requirements referenced include Education provision in Tewkesbury. Specifically, the

Regulation 123 List[1] (October 2018) included Primary Education, Secondary Education, Further Education, and Special Education Needs ("SEN") facilities that are not "directly related to an individual development". This latter point meant that any specific infrastructure needed on site (such as on developments large enough to require a Primary or Secondary School within the red line boundary) would be funded via Section 106, whereas any school expansions or new infrastructure projects required outside of red line boundaries would be covered by CIL. It has been settled by the Courts[2] that "the court does not approach [the task of interpreting development plan policy] with the same linguistic rigour as it applies to the construction of a statute or contract. It must seek to discern from the language used in formulating the plan the sensible meaning of the policies in question, in their full context, and thus their true effect. The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text. The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of coherent and reasonably predictable decision-making in the public interest…"

The publication of the Infrastructure Funding Statement[3] ("IFS") in December 2020 includes an infrastructure list which is intended to replace the Regulation 123 List. Within this document, all reference to Education has been removed, and all that remains is Transport and Highways related infrastructure projects.

TBC state in a letter of 12th February 2021 the following:

Further in September 2019 the CIL regulations were amended to omit regulation 123, removing the previous restriction on pooling more than five obligations towards a single piece of infrastructure and allowing the same infrastructure to be funding [sic] *through both s106 contributions and CIL. The Council's Infrastructure Funding Statement (December 2020) sets out the infrastructure it intends to fund via CIL and section 106 contributions are being sought where compliant with regulation 122.*

A clarification is needed with regard to TBC's approach. Whilst it is true that CIL and S106 can be "spent" on the same piece of infrastructure, TBC cannot seek both S106 and CIL for the

[1] https://minutes.tewkesbury.gov.uk/documents/s34012/CIL%20Report%20-%20APPENDIX%20F%20-%20TBC%20Regulation%20123%20List.pdf

[2] Lindblom LJ – Canterbury City Council [2019] EWCA Civ 669 cited by Court of Appeal Decision [2021] EWCA Civ 15 dated 12/01/2021

[3] https://minutes.tewkesbury.gov.uk/documents/s42646/Appendix%201%20Tewkesbury%20Borough%20Council%20Infrastructure%20Funding%20Statement%202020_A1%2018112020%20Executive.pdf

same piece of infrastructure from one source, as that would be double-dipping, which is excessive, and not fairly and reasonably related in scale and kind to the development.

Furthermore, even though Regulation 123 has been removed, the Regulation 123 List is not explicitly established by Regulation 123 and thus if one exists it is not removed by the removal of Regulation 123[4]. If Education infrastructure is to be removed from the Regulation 123 List, then the CIL rate would need to be reappraised in order to take this in to account. This has not been undertaken, and therefore requesting Section 106 planning obligations is double-dipping. This was confirmed in a Kings Chambers Opinion[5] on "The Practical Implications of the Removal of Reg 123 of the CIL Regulations":

First, given that CIL must have been calculated to make up a funding shortfall to deliver particular schemes or types of infrastructure and will have been independently examined on that basis, where CIL was adopted before 1st September 2019 then Regulation 59 means that a collecting authority can only apply CIL monies to infrastructure on the R123 list.

The CIL Regulations allow for the charging schedule (the amount charged to developments) to be amended. The Local Government Lawyer[6] website says:

The seventh amendment to the original Community Infrastructure Regulations 2010 in the space of nine years came into force on 1 September 2019; Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019 (Amendment Regulations).

We consider in more detail below the key changes for local authorities to the operation of the Community Infrastructure Levy (CIL) in England. This will focus on changes to the process for adopting or amending charging schedules, the removal of Regulation 123 Lists and pooling restrictions, placing monitoring fees on a statutory footing and the introduction of annual Infrastructure Funding Statements.

Charging Schedules

CIL is essentially a planning charge on new development which is to be used by local authorities (as charging authorities) to help with delivery of infrastructure within their areas.

[4] In Regulation 123, the provision of a list is an option contained within the definition of 'relevant infrastructure' as the penultimate paragraph.

[5] https://www.kingschambers.com/assets/files/News/CIL%20Reg%20123%20Lists%20Article%20(Easton%20&%20Robson).pdf

[6] https://www.localgovernmentlawyer.co.uk/planning/318-planning-features/41479-cil-pools-and-the-latest-changes-in-england

Before a charging authority is able to levy CIL it must first produce and publish a charging schedule that sets out the levy rates for different types of development within its area.

Prior to the most recent changes, the procedure for adopting or amending a charging schedule was lengthy. A charging authority was required to prepare a preliminary draft charging schedule for consultation. The charging authority then had to take any representations into account before publishing its draft charging schedule for a further (minimum four week) consultation. Only then could the charging schedule be submitted for independent examination.

So, there is a mechanism whereby the charge per sqm can be changed (to meet any shortfalls) in addition to indexation, but there is a process to go through. That doesn't appear to be on the TBC agenda.

Furthermore, how can it be said that a Section 106 payment is CIL Regulation 122 compliant (necessary to make the development acceptable in planning terms) if CIL could fund the same piece of infrastructure? The Kings Chamber Opinion[7] states:

CIL monies are accounted for or committed through the current R123 list (in effect) and therefore any additional amount is unnecessary in Regulation 122 terms. If an authority maintains an insistence on double dipping then a developer's rational response would be to say that they will only pay CIL and nothing extra through a S106 because no one can be satisfied that the project/infrastructure will not be funded by CIL now that the authority is unfettered by the R123 list.

With regards to the Kings Chambers opinion, it would appear that the Secretary of State agrees by the endorsement of the Inspector's interpretation of double dipping in the Report for the Siege Cross Appeal[8] (15/00296/OUTMAJ) – July 2017. The removal of the CIL Reg 123 does not affect that Appeal decision.

It is understandable that Gloucestershire County Council ("GCC"), as a non-statutory consultee, would ask for the maximum amount of funding that they believe they can secure from new developments; however, it is the responsibility of TBC, as the local planning authority, to apply their professional expertise and knowledge of the CIL Regulations to

[7] https://www.lpdf.co.uk/wx-uploads/files/newsletters/LPDF%20-%20CIL%20Reg%20123%20Lists%20Article%20(Easton%20and%20Robson).pdf

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/633276/17-07-27_DL_IR_Henwick_Park_Thatcham_3144193.pdf

disabuse GCC of their erroneous interpretation of the consequence of the removal of Regulation 123 from the CIL Regulations.

To summarise: the application of Education planning obligations alongside a CIL charge are likely to have an adverse effect on development viability, as the original CIL charge was calculated with the assumption that Education development mitigation would be covered by the funding collected through CIL. On that basis, by levying a CIL and planning obligations for Education from new development without adjusting the CIL rate is excessive under the tests of CIL Regulation 122.

The consequences of this approach could be that development viability of forthcoming developments in the TBC administrative area is adversely affected, making planned development schemes undeliverable with the combination of CIL and Education Planning Obligations. The DfE's Best Practice Guidance entitled Securing developer contributions for Education[9] (November 2019) is clear that development mitigation should not be at a level that adversely affects development viability, and that the delivery of housing must take precedent over the securing of contributions if a viability assessment demonstrates that the contributions would make a scheme undeliverable. The Guidance states:

Developer contributions towards new school places should provide both funding for construction and land where applicable, subject to viability assessment when strategic plans are prepared and using up-to-date cost information.

To now discuss further GCC's updated Planning Obligation Policy:

GCC Updated Planning Obligation Policy

EFM has been discussing planning obligations for Education with GCC since they published and consulted upon their revised child yield and planning obligation policy in November 2019. Subsequent to the withdrawal of this policy, which has yet to be reconsulted upon and has not, to date, been adopted, EFM has been successful in convincing GCC that both their Sixth Form formula, and Early Years formulas, were flawed, and required revision.

When first looking at Sixth Form: GCC were calculating the need for Sixth Form contributions on the basis of three Year Groups instead of two Year Groups (Years 12 and 13). The result of this was that the request was excessive compared to the likely child yield of new

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909908/Developer_Contributions_Guidance_update_Nov2019.pdf

developments. This was confirmed in an email from Stephen Chandler (GCC Place Planning Manager) to Paul Skelton (TBC Development Control Manager) which is reproduced verbatim below:

Dear Paul, [Skelton]

Please accept this email on behalf of GCC Education and note the amended contribution request for Post 16 pupils as highlighted below.

In November 2019 GCC updated its calculation of the numbers of pupils generated by new housing developments, following a population forecasting study of new dwellings built in Gloucestershire, which was published on our website at:

https://www.gloucestershire.gov.uk/media/2100485/gloucestershire-new-build-ppr-report-final.pdf

It has recently come to our attention that the research on Post 16 school places was based upon three year groups of children, including 19 year olds, rather than two year groups of 16-18 year olds. This means that the calculator of 11 additional Post 16 pupils per 100 qualifying dwellings shown in Table 11 of the report should be reduced to 7 additional Post 16 pupils per 100 qualifying dwellings. I would like to clarify that there are no concerns with the methodology used by our consultants in the calculation of these figures, this was due to an oversight in GCC's specification of the survey questionnaire which should have clearly set out two year groups.

We apologise for this error and we are taking the earliest opportunity to correct all requests for contributions towards Post 16 places that have been made between November 2019 and September 2020. We confirm that this error related only to the calculation of Post 16 places, and that calculations for the number of primary school and secondary school 11-16 year old places remain unchanged.

We responded to a planning application consultation for Hucclecote Rd/Golf Club Lane (Reference 18/01239/FUL) and requested a S106 financial contribution towards the provision of additional school places for Post 16 pupils. This application for 148 qualifying dwellings was calculated to generate a requirement for 16.28 additional Post 16 places and we requested a contribution of £374,635.36.

Consequently we now calculate that this application for 148 qualifying dwellings is forecast to generate a requirement for 10.36 additional Post 16 places and a reduced contribution of £238,404.32 towards providing them.

Kind regards

Stephen
Stephen Chandler
Place Planning Manager
Commissioning for Learning
Gloucestershire County Council

The confusion surrounding GCC's Planning Obligation approach, and the potential implications for developments in Tewkesbury of the revised methodology, indicate that the currently adopted 2016 Policy should be adhered to rather than any un-adopted methodology still being revised, and yet to be reconsulted upon following on from a significant number of responses highly critical of the approach.

From an Early Years perspective, an error was identified due to the GCC presumption that 100% of 0-4-year-old children will require a pre-school place, when the GCC Childcare Sufficiency Assessment[10] indicated that uptake across that age range is something less than 50%. (The uptake of places for 0-2-year-old children is much lower than for 3 and 4-year-old children. Some 4-year-old children are in primary school Reception classes because they attain the age of 5 years in that school year/term).

On the 3rd February 2021 GCC accepted that 50% of the Pre-school/Early Years yield in the Consultation document was appropriate. (This was confirmed by Sophie Thomas - Developer Contributions Investment Officer for GCC – to EFM in relation to Homelands Farm, Bishops Cleeve, on 2nd February 2021).

In spite of these errors, a revised consultation document has not been produced and published. GCC is still requesting planning obligations in areas where CIL is enacted and Education is either included in the IFS, or has previously been on the Regulation 123 List and not removed in a procedurally specified manner.

Conclusion

It is evident that following our evaluation of TBC and GCC's approach to Education development mitigation that it is inappropriate for planning obligations to be secured from forthcoming developments when the CIL charge has not been recalculated in accordance with the requirements set out in the CIL Regulations to the effect that CIL will no longer fund Education development mitigation. The result of this, if this approach is maintained, is that development viability of forthcoming schemes will be adversely affected.

Furthermore, GCC has not demonstrated that they have an appropriate planning obligation Policy, which is evident with the recent changes to their revised approach that EFM has secured from them in relation to forthcoming developments in Tewkesbury. The

[10] https://www.gloucestershire.gov.uk/media/2093666/gloucestershire-childcare-sufficiency-assessment-summary-2019.pdf

consequences of following the advice from GCC is, again, an increased risk of adverse development viability, which would result in the TBP being fundamentally undeliverable.

I trust that this information is useful. If any of the above needs any further clarification, please do not hesitate to get in contact.

Kind regards,

Ben Hunter
Education Consultant
EFM