




Spatial Development Team, Regeneration and Planning
Rhondda Cynon Taf CBC
Sardis House
Sardis Road
Pontypridd
CF37 1DU

LDP@rctcbc.gov.uk

By Email and by Post

Our ref: 

Your ref:

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Dear Sirs

**Community Infrastructure Levy Regulations 2010 (as amended)
Draft Charging Schedule: Statement of Modifications closing 10 April 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: Statement of Modifications

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 Charging Schedule does not achieve an appropriate balance between these two objectives.

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

1. The fact that the consultation study is now out of date – as a result of recent amendments to the Community Infrastructure Levy Regulations 2010;
2. The impact on policies enhancing economic performance;
3. The financial assumptions and viability assessments contained in the Council's Viability study;
4. Issues relating to State Aid; and
5. Concerns about the Council's approach to setting CIL charges generally

GA: 3266602_1

1 Impact of Community Infrastructure Levy (Amendment) Regulations 2014/385

As the Council will be aware, the Community Infrastructure Levy (Amendment) Regulations 2014/385 came into effect in February.

These regulations have made a number of wide-reaching changes to the CIL regime, the most important of which, for the purposes of this email, are summarised below:

- Regulation 14 has been amended so as to strengthen the obligations on the Council to objectively justify the adopted charging rates. Reg 14 now states that a Council "*must strike an appropriate balance*" as opposed to simply aiming to do so;
- Examiners are now being asked to assess whether an appropriate balance has, in fact, been struck;
- The Regulations governing payment in kind have been amended to allow local authorities to accept items of infrastructure as well as the transfer of land;
- Draft Regulation 123 lists should now be made available much earlier in the rate-setting process and these will be capable of being examined at inquiry;
- There have been significant changes to the various CIL exemptions; which will significantly affect the Council's expected levels of receipts.

The Draft Charging Schedule: Statement of Modifications, and the viability report on which it was based, do not consider the impact of these amendments and contain a number of assertions which are now incorrect. In particular, the viability assessment was drafted to enable the Council to "aim" 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; it is not sufficiently detailed or well evidenced to establish that this balance has, objectively, been struck.

We would urge the Council to undertake a further, more detailed, viability appraisal based on the CIL regime as it now is, and to re-consult on the preliminary draft charging schedule once the results of this second appraisal are available.

2 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 Statement of Modifications 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.

3 The financial assumptions and viability assessments contained in the Council's Viability Study

We also have a number of concerns about the study DVS conducted in 2012 (the "Viability Study").

The assumptions on which the Viability Study is based are now out of date and the legal process that the study was expected to inform has significantly altered since the report was drafted (see section 1 above). As such, it requires significant updating in the light of these regulatory changes, if the Council is to be in a position to rely on its conclusions.

In particular, since October 2013 a series of announcements have been made that call into question the assumptions made about the resilience of the convenience retail sector. For example:

- In January this year it was announced that Tesco's Christmas and New Year sales for 2013/2014 fell 2.4% in like-for-like sales compared with last year. Morrisons posted a 5.6% fall for the same period.
- Both the Co-Op and Morrisons have announced plans to sell a significant number of their larger format stores; and
- The sector is facing increased competition from online retailers

Given the risk that these assumptions are overly buoyant it is possible that DVS have underestimated the impact that CIL will have on the viability of these types of development schemes.

The Viability Study also 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.

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.

It is not clear whether the Viability Study makes any allowances for residual section 106 and section 278 agreements, in addition to CIL, that may be borne by developers within retail. We urge you to make sufficient allowances for such residual contributions.

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.

Taking the example of a 3700 sqm for a large food store in central Rhondda Cynon Taf used in the Viability Report, this sized superstore would be expected to bear a CIL payment of £370,000, with total building costs of £2,331,000 and, in addition, potentially fund all of the following potential costs:

- demolition, remediation and on site highways works
- the cost of any off-site highways works required to make the development acceptable in planning terms including junction improvements, road widening schemes, new access roads, diversion orders and other 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.

The Viability appraisal allows 10% of build costs for external works (£233,100) and 2.5% of construction costs for any contingency payments (£58,275), equating to a budget of £291,375 to meet all of these costs.

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.

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.

5 Concerns about the Council's approach to setting CIL charges generally

The stated purpose of CIL is to raise revenue for infrastructure necessary to serve development. CIL is intended to address the imbalance of raising funds for infrastructure under the section 106 route, where larger schemes have effectively subsidised minor developments. However, CIL does not replace the section 106 revenue stream – it will simply provide additional revenue for infrastructure.

In light of this, we have some further concerns:

Concerns relating to change of use and conversion projects

The Council appears only to have taken the economics of regeneration projects into account when considering the strategic development areas as otherwise the viability assessments do not appear to have given any weight to this consideration (particularly for retail developments).

As you will be aware, Regulation 40 of the CIL Regulations only permits developers to deduct pre-existing floor space from the CIL calculation if it is 'in lawful use.' Lawful use is defined in Regulation 40 (10) and essentially requires part of a building to have been in use for a six month continuous period in the three years before the date of the planning permission permitting the development.

However, many regeneration projects on brownfield land or town centres involve demolishing, converting or redeveloping buildings that have lain vacant for some time. This is particularly true of schemes which involve changes of use from employment land, where the fact that a unit has been vacant for a considerable time is often a key factor in the Council's decision to grant planning permission for the scheme.

The Viability Study does not acknowledge that the economics of conversion schemes are very different to those of new build schemes. It is difficult to see how the Council can assess whether the imposition of CIL will put the majority of these schemes at risk without having considered its impact on their viability.

ASDA's SUGGESTIONS

1. Instalment Policy

We note that the Council intends on publishing a draft instalments policy for CIL alongside its Draft Charging Schedule. We endorse the Council's decision to introduce an instalment policy, as managing cash flow during development is often key in determining whether a scheme will be successfully delivered. However we note that there is a contradiction in the Draft Charging Schedule. The Council states that instalments are only permitted for cases where total CIL liability is greater than £25,000. The table detailing the instalments contradicts this in that it allows for instalments where the CIL liability is less than £25,000. We recommend that the instalment policy is applicable to all cases that are liable for CIL and that the Council revisits their policy to address this contradiction.

2. Exceptional Circumstances Relief

We note that the Council intends to adopt an Exceptional Circumstances Relief policy.

We also endorse the Council's decision to introduce an Exceptional Circumstances Relief policy. By adopting Exceptional Circumstances Relief, 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. Flat Rate Levy

Accepting for the purpose of this argument the premise that CIL is necessary for the purpose of funding Borough-wide infrastructure, a much fairer solution would be to divide the Council's estimate of total infrastructure costs over the charging period (and in this connection, it is important to remember that the Government's guidance as recorded in the National Planning Policy Framework is that only deliverable infrastructure should be included) by the total expected development floor space and apply a flat rate levy across

the Borough and across all forms of development. That will have the least possible adverse effect upon the market for land and for development, and yet the greatest possible opportunity for the economy to prosper and thrive and for jobs to be created.

The potential impact of a flat rate levy on the viability of those types of development which are not currently identified as viable could be balanced by the Council's implementation of Exceptional Circumstances Relief, as mentioned above.

Consequently, reducing the levy proposed per square metre on retail and residential floor space would not result in a proportionate increase in the levy required on other forms of commercial or other development. However, applying the current proposed levy could run the risk of diminishing substantially the number of such retail stores built, with a consequential loss of employment opportunities and investment.

4. 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;
- Adopts a staged payments policy that allows for instalments on payments below £25,000 as well as above.
- Considers the allowing developers to pay their CIL Liability through the provision of infrastructure; and
- Adopts a single flat rate levy across all development within its boundaries.

Yours faithfully



Thomas Eggar LLP

