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LBTH – Supplementary Evidence Requested by the Examiner (ED5.21)
Comments submitted on behalf of Canary Wharf Group and Bishopsgate Goodsyard Regeneration Limited

Dear Ms Berni,

1. I write in response to the Council's consultation on the above, with a focus on how the "Supplementary Evidence Requested by the Examiner" (the 'Supplementary Evidence') relates to Wood Wharf and Bishopsgate Goods Yard (two of the three strategic sites analysed by the Council, the other being Westferry Printworks). This letter – and the accompanying appendices – is submitted on behalf of both Canary Wharf Group ('CWG') and Bishopsgate Goodsyard Regeneration Limited ('BGY Regeneration Limited').

2. The purpose of this letter is not to repeat points set out in previous representations or points made at the Examination. These are already understood by the Council and are with the Examiner to consider. However, it is important to highlight that concerns regarding the absence of appropriate evidence associated with understanding the impact of CIL on designated Opportunity Areas (Isle of Dogs and City Fringe) remain as explained in representations.

3. This letter focuses on the new Supplementary Evidence and what it tells us about viability and CIL setting in respect of the 'strategic sites'. The Council's Supplementary Evidence is focused on three strategic sites. For the avoidance of doubt, we believe the issues highlighted and explained in this letter apply equally to a wider range of strategic sites (and strategic site allocations) within Tower Hamlets.

Overview

4. The response set out in this letter, and accompanying appendices, has been informed by discussions and meetings with Council officers that have taken place during the consultation period.

5. To aid discussion with the Council, CWG and BGY Regeneration Limited produced a draft Position Statement in an attempt to clarify and consider headline issues. The majority of discussion has sought to focus on understanding the position of each party in respect of interpreting the Supplementary Evidence i.e. a focus on the correct conclusions to draw from the evidence that has been prepared as opposed to the detail of viability inputs / assumptions.

6. The Position Statement has now been completed and is attached at **Appendix A**. The other appendices referred to in this letter are, as follows:

   - Schedule of Comments on Viability Inputs (**Appendix B**) – commentary prepared by DS2 on the viability inputs used by the Council in its appraisals for Wood Wharf and Bishopsgate Goods Yard as set out in Appendix H and I of the Supplementary Evidence.

   - Legal Note on Interpretation of CIL Regulations 73 and 73A (**Appendix C**) – a joint note prepared by Clifford Chance and Hogan Lovells, providing their opinion on the Council's assumptions regarding the use of Regulation 73 ('payment in kind') and 73A ('infrastructure payments').

   - Memo regarding CIL versus Planning Obligations (**Appendix D**) – a memo prepared by DP9, attempting to assess planning obligation Heads of Terms for strategic sites and understand what would happen to these once the Council's CIL takes effect i.e. whether they would remain as planning obligations or shift to CIL.

7. Overall, CWG and BGY Regeneration Limited consider that the Supplementary Evidence provides a much improved and robust basis upon which to consider CIL setting for the strategic sites compared to that considered at the Examination. Although, there remains concern about the appropriateness of some of the viability inputs used by the Council, the biggest difference of opinion between the Council and CWG / BGY Regeneration Limited is how the evidence is to be interpreted and the nature of the conclusions to be drawn.

8. In short, it is CWG / BGY Regeneration Limited's considered opinion that the Supplementary Evidence serves to demonstrate and support the concerns expressed at the Examination in that the strategic sites are challenging and constrained in viability terms. Such sites need to be approached with a great deal of caution given their obvious importance to the LBTH Local Plan and London Plan. The evidence provides the basis for treating the strategic sites differently to other, more standard, traditional scale development sites in the Borough. It justifies a differential rate to be applied to the strategic sites. The safest, most cautious and robust approach is for a nil rate to be applied to the strategic sites. This is necessary to give these sites the best chance of being delivered and not introducing the potential risk of additional burden and cost. To introduce additional cost (irrespective of the scale of this) would be contrary to the clear policy direction set out in the NPPF and NPPG to not threaten the delivery and implementation of the Local Plan.

9. Setting a nil rate for the strategic sites is straightforward for the Council to adopt and manage. It is an approach taken by other authorities in relation to their strategic site / area allocations. It poses no risk to the Council in respect of delivery of important and necessary infrastructure. The strategic sites are large complicated constrained sites. In order to ensure their delivery and, importantly, to mitigate their impacts they require significant investment in infrastructure. This will continue to be provided / secured through planning conditions and planning obligations.

10. Notwithstanding the position in respect of the strategic sites, the Supplementary Evidence does raise obvious questions and concerns about the wider Opportunity Area designations. The Opportunity Areas as a whole are clearly strategically important and contain a range

of large-scale development sites that share characteristics with the three strategic sites that the Council has focused on. As already noted, CWG and BGY Regeneration Limited remain concerned that the viability of the Opportunity Area designations should be considered as a whole.

Key Points

11. In considering the Supplementary Evidence, it is important to consider what the over-arching conclusions are. We need to be mindful of the relevant policy context: one of enabling development, housing delivery, economic growth and the critical need to deliver large-scale urban brownfield developments. It is very easy to get lost in the volume of work that has been undertaken. We have attempted to focus on the headline points derived from the Council's evidence. These are set out below. Taken as a whole they demonstrate that the Council's preferred option of not amending its Draft Charging Schedule in respect of the strategic sites is inappropriate and not supported by its own evidence.

12. The Position Statement at **Appendix A** provides more detailed commentary and should be read alongside the headline points set out below.

a) **Impact on viability and deliverability of Opportunity Areas and strategic sites**

The risk that we are trying to avoid is a negative impact on the viability and deliverability of the Opportunity Areas and strategic sites given their importance to the Local Plan and London Plan. These areas / sites are subject to significant challenges and constraints, including substantial infrastructure costs, and the risk is that this is worsened by a CIL charge. Clearly, a consistent objective throughout all levels of planning policy is concerned with ensuring that development - especially development that forms a key part of the Local Plan - is not threatened.

b) **Lack of area based assessment of Opportunity Areas**

The two relevant designated Opportunity Areas (being the City Fringe and the Isle of Dogs) are clearly fundamental to the successful delivery of the Local Plan, especially in terms of new homes and jobs as well as social infrastructure. This is proven by the further evidence the Council has produced in Appendix A-C of the Supplementary Evidence. We remain concerned, therefore, that a specific area-based viability assessment of these Opportunity Areas has not been undertaken. As an approach, this presumably ought to have been the logical starting point. The further appraisal work undertaken by the Council in respect of three strategic sites should not dismiss the need to understand the viability implications of the Opportunity Areas as a whole.

c) **Challenging and risky nature of the strategic sites**

The Council has focused on three strategic site allocations. Notwithstanding the fact that there are various other strategic sites and allocations that are clearly important, there can be no doubt about the importance of the three selected site allocations to the Local Plan – they are key to the successful implementation of various Local Plan objectives and clearly a catalyst to the regeneration of the Opportunity Areas. The sites are strategic in CIL setting terms and clearly are what the Government had in mind when commenting on strategic sites in NPPG (para 019). It would be perverse to treat

these strategic sites the same as more 'standard' development. They are complicated, mixed use, high density, multi phased and, most importantly perhaps, require substantial infrastructure to make them acceptable in planning terms. Overall, they necessitate significant risk on behalf of developers / investors. They need to be approached with a great deal of caution. This is very much evidenced by the recent Wood Wharf Strategic Development Committee Report.

d) **Additional viability appraisals**

The Council has undertaken additional viability appraisals to assist it in attempting to demonstrate that the strategic developments do not need to be differentiated from other standard development and, therefore, that no change needs to be made to its Draft Charging Schedule. The Council considers that its Supplementary Evidence justifies no change and supports a CIL charge for the strategic sites. CWG and BGY Regeneration Limited disagree.

e) **Appropriateness of viability inputs and assumptions**

CWG and BGY Regeneration Limited have reviewed the further appraisals undertaken in respect of Wood Wharf and Bishopsgate Goods Yard (as provided at Appendix H and I of the Council's Supplementary Evidence). Attached at **Appendix B** is a commentary set against the various viability inputs and assumptions that have been used. There are a mixture of points on which we agree and disagree with the Council.

The most significant points of disagreement relate to: an underestimation of the external costs; the inclusion of a 'maturity factor'; residual Section 106 liabilities; the inclusion of growth or outturn modelling to improve the residual profit return; and the profit returns.

In relation to profit, the target rate of return is the profit requirement, taking on board the nature of the proposed development and the associated risks, linked to market evidence, which is required for the development to be technically viable. The profit returns in the Council's Supplementary Evidence clearly demonstrates that the strategic sites analysed, are not viable on a current day basis. Neither are they viable with significant growth assumptions.

It is worth noting that the growth assumptions for residential values that have been incorporated by the Council are significantly in excess of any central London agents' forecast that DS2 has been able to locate. Regardless, DS2 are of the opinion that growth or outturn modelling is not an appropriate basis on which to calculate CIL rates for the strategic sites. The NPPG for policy making clearly requires the assessment of viability to refer to present day costs and values and not based on an expectation of future rises.

For other comments relating to the areas of disagreement please refer to **Appendix D**.

f) **Conclusions drawn from the additional viability appraisals**

Notwithstanding the outstanding concerns with the viability inputs as explained above, the appraisals demonstrate that both Wood Wharf and Bishopsgate Goods Yard are

challenging and unviable. The scenarios set out in Table 4 of the Supplementary Evidence (pages 18-19) are helpful. They demonstrate the difficultly faced by the Council and developers / investors in delivering these sites. In none of the scenarios considered, does either Wood Wharf or Bishopsgate Goods Yard produce sufficient viability (a suitable IRR) in reality for a CIL rate to be justified. Table 4 is essentially the key / pivotal piece of evidence. It tells the Council that no additional cost burdens, no matter how large or small, should be considered appropriate for these strategic sites. It demonstrates that there is no basis for setting a CIL rate for the strategic sites.

It appears that the Council draws no conclusion from Table 4 of the Supplementary Evidence. It does not comment on what it means in terms of the reality of development viability for the strategic sites. There is, for example, no consideration anywhere of what an appropriate / sufficient IRR would need to be before a CIL charge should be considered. Instead, the Council goes on to focus on considering how a charge can be justified through on one hand, flexing affordable housing and, on the other, explaining that the charge is a small proportion of cost and is, therefore, effectively irrelevant.

As explained in representations and at the Examination, it is CWG and BGY Regeneration Limited's strong opinion that the target benchmark IRR for strategic development is 20% for present day appraisals and potentially higher for outturn appraisals. This has been accepted as a reasonable target by the Council in its consideration of the scheme specific viability of Wood Wharf and, the Council's advisors will be aware that this is the target level accepted on similar scale development on other large sites elsewhere in London. None of the present day appraisals, regardless of the level of affordable housing included at between 25% and 35%, derive anything other than a single digit IRR.

g) **'Flex' in affordable housing policy**

The Council's justification that the strategic sites can afford a CIL charge because of the inherent 'flex' in affordable housing is flawed and a wholly inappropriate approach. As explained in the Position Statement (**Appendix A**), the 'flex' in affordable housing policy is due to the output being the maximum reasonable subject to viability testing. But, importantly, the 'flex' is intended for the planning application stage once site and scheme specific viability can be fully considered. To apply the 'flex' at the CIL setting stage is absolutely not what is intended by the Council's affordable housing policy, as well as that within the London Plan. In relation to CIL setting, Government policy and guidance points to setting a nil or low CIL charge. It does not point to pre-judging and flexing other policy objectives.

LBTH as an authority is especially concerned with the delivery of affordable housing: it is a significant political priority. LBTH is successfully delivering substantial affordable housing: it is arguably the single biggest political priority for the Council. In reality, planning officers and politicians regularly seek in excess of 35% affordable housing provision on individual planning applications. It is hugely surprising in this context that the Council is proposing to set its CIL rate in the full knowledge that, for the strategic development sites, affordable housing will be adversely impacted. This is worrying and there are inherent risks in adopting this flawed approach as a basis for the Charging Schedule.

h) **The relative cost of CIL**

The Council's proposition that a CIL charge can be applied to the strategic developments because it is a very low proportion of cost is misleading and a flawed approach. As explained in the Position Statement (**Appendix A**), we wouldn't disagree that CIL is a relatively low proportion of total cost, but this does not mean it can be ignored and it is not a significant sum. Strategic sites are large and complicated. The costs at play are substantial and small changes are significant. Also, and most importantly, the Council's proposition ignores the conclusions drawn from Table 4 of the Supplementary Evidence: that viability in all scenarios is challenging and marginal and there is no basis for setting any charge irrespective of how this charge relates proportionately to other costs.

i) **CIL versus planning obligations, and provision of in-kind infrastructure**

The Council assumes that the significant infrastructure necessary to support development of the strategic sites, and in turn to make them acceptable in planning terms, will be delivered through CIL (as opposed to planning obligations). It considers that the cost of infrastructure can be off-set against CIL as a payment in-kind under the CIL Regulations. This is a risky assumption and ignores the practical complications in distinguishing between infrastructure necessary to make the development acceptable and CIL infrastructure on strategic sites so as to avoid double charging and the uncertainties around the use of payments in kind under Regulation 73 and 73A. The Council has obtained a legal opinion (see Appendix D of the Supplementary Evidence). The fact that it has had to do so speaks volumes: were the Council sure of its approach and, in particular, sure it was taking a cautious approach, it is surprising that it has felt necessary to obtain a legal opinion. In fact, the legal opinion confirms our view: the matter is complicated; CIL is not intended to mitigate specific impacts of development or make development acceptable in planning terms; and overall the uncertainty in the interpretation of the payment in kind provisions means the Council should take a more cautious approach for the strategic sites i.e. assume a more significant residual Section 106 cost compared to more standard development.

CWG and BGY Regeneration Limited appreciate the Council has attempted to clarify the position through an approach to CLG on the matter. An email exchange is attached at Appendix E of the Supplementary Evidence. The email from CLG dated 11th July 2014 very clearly explains that CIL is not intended to make individual developments acceptable in planning terms and is not intended to reduce the overall liability of planning obligations on developers. It is clearly not the Government's intention that the Regulations should be used – particularly Regulations 73 and 73A – in a way that enables any sizeable shift from planning obligations to CIL in respect of in-kind infrastructure necessary to mitigate specific development.

In addition to the Council's legal opinion and email exchange with CLG, it is worth drawing attention to their draft Planning Obligations SPD (ED2.4). This makes clear that planning obligations will be the mechanism for securing infrastructure necessary to mitigate specific developments and to make development acceptable in planning terms. In itself, the SPD should have caused the Council to specifically consider differentiating between the residual Section 106 assumptions for standard development versus strategic development. There can be no doubt that strategic development,

because of its very nature, requires a great deal more mitigating infrastructure than more standard development.

CWG and BGY Regeneration Limited have asked their respective lawyers to review the Council's legal opinion and CLG emails and offer comment on the matter. A joint legal note is attached (**Appendix C**), prepared by Clifford Chance and Hogan Lovells – leading law firms who are well experienced in dealing with the day to day practicalities of delivering large and complicated development projects. The legal note explains that Regulation 73A(7)(b) of the CIL Regulations (2010) prohibits payment in kind where the infrastructure in question is necessary to make a development acceptable in planning terms. If strategic sites are subject to full CIL liability there is a strong likelihood of double charging unless clear guidance is issued (or the courts clarify the issue) to ensure there is no overlap between Section 106 obligations for site specific impact mitigation and CIL infrastructure. The viability implications of this double charging for the deliverability of sites would be considerable.

Notwithstanding the Clifford Chance / Hogan Lovells note, on the basis of the Council's own evidence, the only credible / robust assumption is to assume in-kind infrastructure will continue, in reality, to be provided via planning obligations. Clearly, this is most significant in respect of strategic development. Paragraphs 3.3 and 3.4 of the Wood Wharf Committee Report (Appendix N of the Supplementary Evidence) provide a good indication of the significance of the in-kind infrastructure required for strategic development.

Consideration of the Council's Options

13. In the context of the above headline points, CWG and BGY Regeneration Limited have considered the different options that the Council has set out on pages 23-29 of their Supplementary Evidence. We comment on the options, as follows:

- Option 1 – this is the Council's preference. Most critically, it ignores the main and basic conclusion drawn from the further viability appraisals, in that there is no viability buffer to consider any CIL charge. Further, Option 1 makes a series of concerning assumptions insofar that it is based on: flexing affordable housing assumptions; CIL being a small proportion of cost; and an assumption that in-kind infrastructure will be provided through CIL (via Regulation 73 and/or 73A). As demonstrated by the headline points above. This is not a credible option and is unsafe. It risks adding further cost burden and complication to the viability and deliverability of the strategic sites. A more cautious and careful approach is necessary in accordance with the NPPF and NPPG.

- Option 2 – this is CWG and BGY Regeneration Limited's preferred approach. It is the most robust and evidenced option on the basis of the viability appraisals undertaken and the scenarios considered in Table 4 of the Supplementary Evidence. It supports the delivery and viability of the strategic development sites and, in turn, the Local Plan and London Plan. It assumes that in-kind infrastructure will be delivered through planning obligations which we consider to be the correct approach in light of the findings set out in the Council's legal opinion and the joint Clifford Chance / Hogan Lovells legal note.

- Option 3 – has been ruled out by the Council. It is perhaps worthy of exploring and debating further. It requires clarity on the split between CIL and Section 106 / planning obligations for the strategic development sites. It assumes that a certain amount of Section 106 obligations would be 'scaled-back' and switched to CIL. CWG and BGY Regeneration Limited has undertaken an analysis of this, drawing on the recent Wood Wharf committee report as up to date evidence. See attached a memo at **Appendix D**. The memo serves to further demonstrate the complicated nature of this topic and illustrates the likelihood that any scaling-back will be minimal. It is challenging to see how a robust conclusion can be reached upon which to inform a reduction in the CIL rates for the strategic sites. The fact of the matter is that the memo demonstrates the need to take an overall cautious approach and assume that significant infrastructure payments and in-kind contributions will continue to be provided through Section 106 / planning obligations. This suggests the need to focus on Option 2 as opposed to Option 3.

Conclusion

14. It is accepted and recognised that the Council has undertaken substantial additional evidence – Supplementary Evidence – in respect of the strategic sites. This Supplementary Evidence is very useful in better and more fully understanding the complicated nature of viability for strategic sites: a point CWG and BGY Regeneration Limited emphasised in representations and at the Examination. It demonstrates that the viability of the strategic sites is such that a CIL charge, no matter how large or small, cannot be applied. To do so, would be counter to the policy direction set out in the NPPF and NPPG which is concerned with ensuring the viability and deliverability of the Local Plan is not threatened.

15. Because of the importance of the strategic sites in delivering important Local Plan and London Plan objectives – especially those associated with the designated Opportunity Areas – it is CWG and BGY Regeneration Limited's considered opinion that the Supplementary Evidence is insufficiently robust to support the Council's Draft Charging Schedule or show that the CIL is set at a level that will not put the overall development of the Borough at risk.

16. Alternately, there is sufficient robust evidence to support differentiating the strategic sites from more standard development. The evidence justifies taking a cautious and careful approach to the strategic sites. The overriding conclusion is that a nil CIL charge should be applied (the Council's Option 2).

17. In addition, CWG and BGY Regeneration Limited consider that the Supplementary Evidence serves to pose questions / concerns over the implications of the Charging Schedule in respect of the wider Opportunity Area designations. We are concerned that the need for an area based assessment of the Opportunity Areas is not dismissed or overlooked by focusing on three strategic sites.

18. We believe that it would be helpful if the key points set out in this letter were subject of an additional hearing. CWG and BGY Regeneration Limited would like to be notified of such a hearing and reserve their right to attend. In the meantime, please do not hesitate to contact me if you require further information.

Yours sincerely,

CRAIG TABB
DP9 Ltd

cc.
Joseph Ward - CIL Viability and Property Officer, LBTH
Richard Linton - Principal Strategic Planner, GLA
Pauline Butcher – Examination Programme Officer

Appendix A: Position Statement

London Borough of Tower Hamlets
Community Infrastructure Levy Charging Schedule Examination
Supplementary Evidence Requested by the Examiner

Position Statement from Canary Wharf Group and Bishopsgate Goodsyard Regeneration Limited

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This Position Statement provides a response from Canary Wharf Group ('CWG') and Bishopsgate Goodsyard Regeneration Limited ('BGY Regeneration Limited') to the conclusions drawn by the Council in its document titled 'Supplementary Evidence Requested by the Examiner' (30th July 2014) (ref. ED5.21). An initial draft was produced following a meeting with the Council on 13th August 2014 and was intended to assist in progressing discussions with the Council during the consultation period. The draft Position Statement was then reviewed with the Council on 27th August 2014.

This Position Statement is structured according to relevant topics covered by the Council's document 'Supplementary Evidence Requested by the Examiner'. For each topic it summarises the Council's position as understood from their document and, in turn, sets out the developer's position (Nb. the developer's position refers to that of both CWG and BGY Regeneration Limited). The developer's position against each relevant point as being one of either agreement, disagreement or general comment. In setting out the respective Council and developer positions the document is focused on the key points contained within the Supplementary Evidence, as is not intended to cover all points.

Section 1 – Introduction and Overall Context

Para ref.	Council's Position	Developer's Position
1.5	"…The information does not change the overall conclusion that the CIL rates proposed aim to strike what the Council considers is the appropriate balance (under CIL Regulation 14). The Council has been particularly conservative in its approach, in line with the obligation of fairness as a public authority."	Disagree: It is considered that the further evidence produced serves to demonstrate that more caution is necessary in respect of the strategic sites. This is necessary so as not to threaten the implementation of the Local Plan.

Section 2 – Development Targets and Opportunity Areas

Para ref.	Council's Position	Developer's Position
2.8	"The Council does not consider that any individual site allocation is critical to the delivery of the Local Plan."	Comment: Note that there are a number of sites within the Borough that are clearly important and play a significant role in delivering the

		Local Plan. Some sites are more important than others and play a more strategic role. Wood Wharf is a good example of this. Mayor of London's Stage 1 Report for Wood Wharf states: • in respect of commercial uses, that the development would make a significant contribution towards the indicative employment capacity for the wider Isle of Dogs Opportunity Area (para 25); and • in respect of residential use, that the development would represent between 50% and 150% of the Council's annual provision, depending on the number of units delivered, which could make the single largest contribution to the borough's housing target (para 30). The Council's report to Strategic Development Committee concerning the current Wood Wharf planning application highlights in various places the importance of the development e.g. paragraph 2.13.
2.11	"…a broad estimate of the likely housing capacity identified in the SHLAA (2013-2036) which falls within indicative Opportunity Areas is set out in Table 1 below. It demonstrates that growth is anticipated primarily in these opportunity areas but not exclusively."	Comment: It is clear from the analysis undertaken that the designated Opportunity Areas account for the majority of the Council's estimated growth and, for this reason, are clearly fundamental to the Local Plan (as well as the London Plan). Based on the numbers set out in Table 1, the Opportunity Areas collectively account for 78% of growth. We are concerned that the viability and deliverability of the Opportunity Areas as a whole has not been considered.
2.12	"The Council does not consider that the existence of Opportunity Areas within the Tower Hamlets Charging Authority should result in the setting of a lower rate. A site that is located within an Opportunity Area has no additional viability burdens compared to sites located outside of Opportunity Areas."	Disagree: Opportunity Areas are the capital's major reservoir of brownfield land with significant capacity to accommodate new housing, commercial and other development. They are critical to housing and job targets. However, their delivery is complicated and usually requires significant upfront investment in land assembly

		and enabling infrastructure. This has a direct implication on the viability and deliverability of development sites. Opportunity Areas are diverse and range in size and nature across London. They generally require substantial investment and other intervention to bring forward. This is especially the case for the Opportunity Areas located in east London (refer to paragraph 2.61 of the London Plan). The NPPG explains, at paragraph 019, that in setting CIL rates "the focus should be in particular on strategic sites on which the relevant Plan relies." There is no definition of what is meant by 'strategic site'. But, there can be no doubt that the Opportunity Areas are key strategic sites / areas / zones. Given their importance to both the London Plan and Local Plans, they should be a particular focus of viability testing from a CIL perspective. An area based approach to Opportunity Areas is necessary in order to understand the overall implications of CIL on the London Plan and Local Plan. This is an approach that has been taken by other Councils within London (most recently by the Royal Borough of Kensington and Chelsea as well as the London Borough of Hammersmith and Fulham).
2.18	"These appraisals all assumed that the full CIL would be paid and that on site social infrastructure requirements e.g. Idea stores, schools and health facilities would be provided in kind as provided for under the Community Infrastructure Levy Regulations (2014 as amended, assumed to be land in kind under the 2013 regulations). This (in theory) allows for the Council to accept infrastructure or land payments, in lieu of cash payments, to discharge a CIL liability. This is stated in the Draft Planning Obligations Supplementary Planning Document (ED2.9) and reflected in the Regulation 123 list within the RDCS (ED2.1)."	Disagree: An assumption that on-site infrastructure requirements would be provided in-kind through CIL, as opposed to through Section 106, is not accepted by either CWG or BGY Regeneration Limited as an acceptable approach. The safest and most cautious approach for the Council to have taken is to assume that in-kind infrastructure necessary to enable and mitigate the development of the strategic sites would continue substantially through Section 106. Refer to comments below in relation to Section 3 of the Council's report.

Section 3 – The Use of In-Kind CIL Payments, the Implications for the Regulation 123 List and Residual S106 Assumptions

Refer to joint legal note prepared by Clifford Chance and Hogan Lovells (at Appendix C) and DP9 memo (at Appendix D) for a fuller and more detailed consideration of this matter.

Para ref.	Council's Position	Developer's Position
3.1-3.3	"The Council intends to accept in-kind CIL payments in line with the CIL Guidance 2014 and as provided for in the CIL Regulations 73 and 74. An In Kind Payments Policy will be prepared to allow for this. The main purpose of providing social infrastructure as part of the site allocations for the strategic sites within the borough is to support the development of the Tower Hamlets Area. It was not included in order to mitigate the impact of their particular development, i.e. make the development acceptable in planning terms. As a result, this infrastructure is included in the Regulation 123 list, and is intended to be funded (in whole or in part) by the use of CIL monies, and not by the use of planning obligations. The Council's intention to accept in-kind payments is in accordance with the statutory purpose of the CIL, as stated in the Planning Act 2008 that: • "the overall purpose of CIL is to ensure that costs incurred in providing infrastructure to support the development of an area can be funded (wholly or partially) by owners or developers of land" (S.205(2)) • the authority that charges CIL are required to "apply it, or cause it to be applied, to funding infrastructure" (S.216(1))."	Comment: It is positive that the Council intends to exercise payment in kind (Regulation 73) and infrastructure payments (Regulation 73A). We accept that the Council's intention is in line with the Regulations. However, as we set out below, unfortunately the current Regulations are not straightforward and ultimately pose serious questions and concerns in respect of, in reality, how in-kind infrastructure is delivered. Overall, CWG and BGY Regeneration Limited consider that the only credible approach that can be taken at this stage is to assume that infrastructure provided in-kind that is integral to a strategic development scheme will continue to be provided through Section 106 (and not CIL). A number of other authorities have come to this conclusion in respect of strategic development, most recently the London Borough of Hammersmith and Fulham. It is also worth highlighting that this is a concern that we expressed at the very outset of the CIL setting process. Extract from representations to the Preliminary Draft Charging Schedule, as follows: *"The inference of the Viability Study is that future Section 106 will be scaled back significantly once the Charging Schedule comes in to effect. It is CWG's considered opinion that this is at odds with the future 'normal circumstances' associated with how development will be delivered – especially in the case of strategic development sites i.e. the Opportunity Areas / site allocations that underpin the Development Plan. A more cautious approach to the*

		'scaling back' of Section 106 should be assumed. This is because: • *Section 106 (and planning conditions) are to remain the primary means of mitigating the direct impacts of development (it is worthy of note in this regard that the statutory tests for Section 106 planning obligations set in Regulation 122 are in effect the same as those that were provided in guidance in Circular 5/2005).* • *Because Section 106 continues to be the means through which direct impacts are mitigated, it follows that Section 106 commitments to infrastructure do not automatically legitimise a reduction in CIL. CIL is not intended to secure the mitigation of impacts from individual developments, so that Section 106 obligations which are necessary for a development (whether by way of money or infrastructure) have little to do with CIL.* • *A charging authority should not normally assume that CIL is the appropriate way to provide infrastructure which is likely to be necessary for the development of individual sites or groups of up to 4 sites. Apart from risking double charging for such infrastructure, such an approach also runs risks for the robustness of planning decisions which approve development without securing a commitment to the provision of necessary infrastructure on the assumption that it will be provided through CIL. Planning permissions would be more secure if any necessary commitments were the subject of binding Section 106 obligations i.e. no material change to current circumstances.* • *The terms of Regulation 123 make it possible for authorities to continue to seek pooled payments towards a particular infrastructure project, or type of infrastructure*

		from up to five developments. This is to cover the position, for instance, where a small number of developments collectively trigger the need e.g. for a new local school. Such payments for specific infrastructure projects remain legitimate under Section 106 – even if CIL is being charged more generally for 'education' as a type of infrastructure, provided that the specific infrastructure projects are excluded from the Regulation 123 list - and can be useful in enabling developments to come forward hand in hand with necessary infrastructure. • *There are limited circumstances in which CIL can be paid in kind through land or infrastructure. Regulation 73 allows for the payment in kind of CIL but only through the provision of land and the Regulation specifically excludes such arrangements if the land is provided under the terms of a Section 106 obligation."* The concerns set out above still remain and are not answered by the legal opinion provided to the Council. See below. Overall, CWG and BGY Regeneration Limited strongly recommend that the Council amend its assumptions and work on the basis that the infrastructure to be provided to enable the development of the strategic sites is delivered through Section 106 obligations.
3.4	"The Council has received Counsel advice in relation to this issue which discusses the different legal interpretations. This advice is attached at Appendix D. This confirms that there is still considerable scope for in-kind infrastructure payments to be made, even if the stricter interpretation of regulation 73A is adopted. At this stage, of setting the CIL rate, the rate itself will not be affected by whether there is in-kind provision or not – the CIL liability will still need to be calculated in the normal way."	<u>Disagree:</u> We have considered the Counsel advice. It serves to demonstrate that the matter of in-kind infrastructure is complicated and it does not justify the Council's current approach. It calls in to question why the Council considers its approach to be cautious. The Counsel advice and advice that CWG and BGY Regeneration Limited have received from lawyers serves to demonstrate that the most cautious and appropriate approach is to assume in-kind infrastructure is delivered through Section 106.

		Key points regarding in-kind payments (Regulation 73) This relies upon land to be transferred to and acquired by the Council. In the context of urban, brownfield, mixed use, complicated, etc developments, it is very difficult to see how this would be a realistic prospect for the strategic development sites. Its scope is extremely limited and the Council cannot reasonably assume it is likely to be exercised by developers. Key points regarding infrastructure payments (Regulation 73A) Given the wording of the Regulations, the Council would be able accept a payment in kind in only very limited circumstances and there is significant uncertainty and risk associated with the approach (refer to legal note at Appendix C). Given that the Council is purporting to take a cautious approach when determining the manner in which CIL requirements should be applied to strategic sites, it is surprising that the Council is "pushing the boundaries" by seeking to treat Regulation 73 as having a wider application than was clearly intended when the legislation was introduced.
3.5	"In addition, the Council has received the email attached at Appendix E from the Department for Communities and Local Government (CLG) which the Council considers supports its position on the ability of the Council to accept in-kind payments for infrastructure."	Disagree: The correspondence does not support the Council's position. It serves to demonstrate that the matter is less than clear and that the Council should be extremely cautious. The email from CLG dated 11th July 2014 very clearly explains that CIL is not intended to make individual developments acceptable in planning terms and is not intended to reduce the overall liability of planning obligations on developers. It is clearly not the Government's intention that the Regulations should

		be used – particularly Regulations 73 and 73A – in a way that enables any sizeable shift from planning obligations to CIL in respect of in-kind infrastructure necessary to mitigate specific development.
3.7	"If however, the Examiner were minded to agree with the representations put forward by the developers of strategic sites which propose that in-kind CIL payments are inappropriate to deliver on site social infrastructure, the Regulation 123 List would have to be amended. The infrastructure requirements detailed in the MDD site allocations would be excluded from the Regulation 123 list and secured as planning obligations through S106. This brings significant challenges due to the restrictive pooling arrangements and it is also not in the spirit of seeking to adopt a CIL for the major part of infrastructure provision. Please refer to Appendix F(1) which sets out the Regulation 123 list in this instance."	Comment: We agree that amendments to the Reg 123 List should be made. The detail of this should be further discussed with the Council subject to their views on the above. We disagree that assuming in-kind infrastructure will be delivered through S106 is a 'significant challenge'. The nature of the sites in question and how they are being brought forward, does not pose any serious questions about pooling restrictions.
3.13, 3.14, 3.15	"The Council considered the most appropriate exercise to undertake, to test if the Residual S106 assumptions made are appropriate, is to compare the actual amount secured on the Wood Wharf scheme (which was granted permission by the Council's Strategic Development Committee on the 21st July 2014) with the amount that would be payable for that scheme if the assumptions of £1,220 per residential unit and £5 per sq. ft for commercial space were applied." "When assuming an LBTH CIL world, only the Heads of Terms that will remain once CIL has been implemented have been accounted for in this assessment and in Table 3 below. This is set out in set out in ED2.4: Draft Planning Obligations SPD - Revised Draft Charging Schedule." "In terms of benchmarking, it is clear from Tables 2 and 3 above that the S106 assumptions adopted are appropriate due to the fact that the application of these assumptions results in a very similar	Disagree: Because of the concerns set out above, CWG and BGY Regeneration Limited disagree that in a CIL world only those Heads identified by the Council will remain being delivered under S106. The real likelihood is that more substantial Heads will remain under S106 i.e. those associated with significant in kind infrastructure. Refer to DP9 memo at Appendix D.

	amount of S106 that would be payable on the actual indicative Wood Wharf scheme, assuming the implementation of CIL and that in-kind payments can be accepted."	

Section 5 – Bishopsgate Goods Yard, Wood Wharf and Westferry Printworks – Options

Para ref.	Council's Position	Developer's Position
5.2	"It should be noted that, in order to ensure this exercise is as fully informed as possible, the Council requested that the owners/developers of the Wood Wharf and Bishopsgate Goods Yard sites release their scheme specific viability information. This request was denied."	Comment: Scheme specific viability information is confidential at this stage. However, viability inputs to the further appraisals prepared by BNPP have been reviewed and commented on – refer to Appendix B.
5.3	"In order to inform these options, further viability appraisals of the Wood Wharf, Westferry Printworks and Bishopsgate Goods Yard sites have been undertaken. It was appropriate to undertake further appraisals of these sites due to the fact they comprise a combination of unique characteristics, which are that: - • They are required under the local plan to provide items of social infrastructure as part of their development; • They are likely to accommodate particularly 'high rise' development, resulting in a lower gross to net ratio in terms of income generating floorspace; • They will have multiple abnormal costs such as decontamination and needing to account for construction next to water bodies or a train station; • They have long build out periods so are exposed to greater risks in terms of construction and finance, as well as achieving a return over a longer period."	Comment: It is agreed that the these sites comprise a series of characteristics that set them apart from other more generic / normal development sites. In addition to the points noted by the Council, in line with points raised in relation to Section 3, we note that these strategic sites raise important questions about the relationship between CIL and Section 106 regarding infrastructure funding – this is a point of difference compared to more generic / normal development (the same challenges regarding infrastructure funding do not arise). It is accepted that infrastructure funding is necessary. The questions raised relate to the mechanism for securing funds and associated risks / issues. As explained in relation to Section 3, CWG and BGY Regeneration Limited consider that the Council should assume substantial infrastructure funding continues to be provided through Section 106.
5.4, 5.5	"The assumptions and variables used in these further appraisals have generally been derived using submissions made by representors. Some assumptions and variables have been made to ensure the appraisals take full and exhaustive account of the Development Plan. Appendix H sets out the assumptions that have	Comment: Refer to comments in Appendix B.

	been adopted for this set of appraisals. For instance, and simply for the purposes of these appraisals, it has been assumed that the full Mayoral CIL and SPG payments would be made. In order to ensure that the appraisals, attached at Appendix I, are as realistic as possible, the assumptions are, where possible, based on publicly available planning documents as well as market research and knowledge. Appendix J sets out the detailed floor area assumptions for these sites."	
Option 1: Maintain the CIL Rates as Proposed in the RDCS (and updated in the Statement of Modifications)		
5.16	"Whilst the further appraisals provide useful information regarding the three strategic sites, the Council considers that the appropriate balance has been struck, and this remains the reasonable option. The reasons for this are as follows, and are set out in more detail below: - • Guidance states that the appraisals of strategic sites used to inform a CIL should be consistent with appraisals undertaken to support the Local Plan, and that the appraisals undertaken are consistent. • The Council's affordable housing policy affords flexibility and negotiation so a rate setting process should consider this. • The impact of maintaining the rates as proposed has a significantly lower adverse impact upon the objectives of the Development Plan, as opposed to zero rating these sites. • The CIL rates as proposed would constitute a very low proportion of a scheme's Net Development Value so it is unlikely to be the overriding factor in respect of the viability of a scheme."	<u>Disagree:</u> Both CWG and BGY Regeneration Limited consider that the further appraisals demonstrate that development viability is low and complicated on a current day basis*. Because the sites in question are important and strategic in nature, the Council should consider setting a low or zero levy rate for the extent of the associated site allocations / designations. This accords with national guidance provided on the matter. A low or zero levy rate for Wood Wharf and Bishopsgate Goods Yard is justified based on the Council's evidence and is a credible / robust approach. Table 4 of the Supplementary Evidence usefully provides a series of scenarios. It serves to demonstrate that viability for the strategic sites is challenging. It proves that the viability of these sites will need to be carefully looked at in order to ensure delivery. Viability will need to be considered and negotiated very carefully at the planning application stage, when the Council and developer can take a view of different assumptions: growth, affordable housing, etc. At this stage, in setting CIL, Table 4 wholly demonstrates that viability is not positive / high enough for a CIL rate to be applied. We are concerned that overall there appears to be a lack of reality to how Tables 4 and 5 comment on IRR. Has the Council

		considered what IRR is appropriate for a site to come forward? This is not apparent from the further evidence that has been prepared. We provided comment on this as part of written statements to the examination. It is considered wholly inappropriate for the Council to base its CIL rates on 'flexing' its affordable housing policy. This is commented on further below. We consider that it is essentially irrelevant what the cost of CIL is given that Table 4 is demonstrating that the viability of the strategic sites is so challenging that no CIL should be applied (irrespective of how much this is relative to net development value) i.e. it doesn't matter if it is low, the principle is that no additional cost burden should be added (high or low) because this would worsen / risk delivery. *(*It is inappropriate for CIL to be based on an expectation of future rises in values, the NPPG for policy making clearly requires the assessment of viability to refer to present day costs and values and not based on an expectation of future rises).*
5.20	"The appraisals that inform the DCS and RDCS are consistent with the appraisals undertaken to support the Council's Managing Development Document (ED4.2)."	Comment: It is important to note that the appraisals may be consistent, but they are for very different purposes. The setting of CIL rates as a fixed cost (tax) to development is different to policy-making, which is inherently more flexible and provides room for negotiation on a case by case basis.
5.21	"…The appraisals were subsequently updated, at the RDCS stage, to reflect specific comments by developers and accommodate a further conservative approach."	Comment: To be clear, both CWG and BGY Regeneration Limited have a number of concerns with the appraisals relevant to the RDCS stage. A number of comments / issues remained outstanding and were not taken on-board by the Council at the submission stage. These comments / issues were, of course, debated at the

		Examination.
5.27	"The Council has taken account of 35% affordable housing in its viability appraisals used to inform the CIL rates. However, it is difficult to reflect the flexibility of the Council's affordable housing policy (policy SP02 of ED4.1: Tower Hamlets: LDF Core Strategy), which contains the term 'Subject to Viability', in these appraisals. This 'Subject to Viability' element of the affordable housing policy affords flexibility to negotiate the level of affordable housing down from 35% if other benefits of a development outweigh the failure of that site to contribute the required amount of affordable housing provision. A good example of this is the recently permitted Wood Wharf scheme, which has been granted permission by the Council's Strategic Development Committee. The level of affordable housing to be provided on the scheme is defined as 25%, in current market conditions, and can rise to 40% if the value of the scheme increases."	Comment: We do not disagree with what the Council state here in respect of their affordable housing policy: it is a statement of fact. The concern rests with its relevance to CIL setting (see below in respect of para 5.28). Although, we do note that an outstanding issue that was raised at the Examination is whether the Council should have taken into account the top end of its affordable housing policy requirement (i.e. 40% and not 35%). CWG confirm that the current committed level of affordable housing associated with the Wood Wharf development is 25%. This is 10-15% below the Council's policy target. In itself this serves to underline the care and caution that needs to be taken when considering additional cumulative cost burdens on the development. However, and most importantly, we note that the Council refer to the 25% level of affordable housing being provided on Wood Wharf (re. the current planning application) as based on 'current market conditions'. This is factually incorrect and fundamentally misleading. The 25% committed to assumes significant growth over and above the current day position. On a current day basis no affordable housing would be viable. Again, this serves to underline the challenging nature of scheme viability for the strategic sites. The Council's report must be amended and clarified in this respect.
5.28	"The application of the 'subject to viability' clause in policy SP02 means that the implications of the Council maintaining its CIL rates as proposed for the 3 sites in question is that, in the event that at the time the scheme applies for planning permission, the combined impact of the 35% affordable housing policy and the CIL liability (proposed as existing) make the scheme unviable, then the level of affordable housing required to be provided could	Disagree: In setting CIL rates Charging Authorities must take account of policy requirements set out in the 'relevant plan' (which for LBTH comprises the London Plan and its Core Strategy and Managing Development Document). For CIL viability testing, the costs associated with the provision of affordable housing within

	be reduced. The extent of the required reduction is set out in row 3 of Table 5 above. This will enable the holistic requirements of the development plan to be accounted for, rather than an individual element such as affordable housing. The flexibility in this policy needs to be accounted for in setting the CIL as a 35% assumption is highly conservative and cautious."	development schemes are significant. These costs need to be accounted for to inform the proposed CIL charging rates. As already explained above in response to paragraph 5.16, the further evidence / appraisals prepared by the Council demonstrates that viability associated with the strategic sites is challenging. Of course, should policy burdens on development be 'flexed' then this will improve the viability position and potentially enable a CIL charge to apply. But, in principle, the Council should be taking a more cautious and considered approach. The 'flex' allowed for within affordable housing policy (the subject to viability / maximum reasonable test) should be left for the planning application stage: for this is what it is intended. The time to be making a judgement call as to how affordable housing policy should be 'flexed' is at the planning application stage: once all factors and material considerations can be weighed-up and balanced by the planning authority. To rely on the 'flex' now, risks delivery. It is absolutely not what the Council should be doing at the policy / CIL setting stage. The potential full cost of affordable housing policy (35%) should be understood and assumed as part of CIL setting. This is the safest and most robust approach. Clearly, the evidence, as a result of applying 35% affordable housing, is flagging-up that the strategic development sites have low viability. This should equate to the consideration of a low or zero CIL rate in line with Government guidance. Government guidance points to a low / zero CIL rate given the circumstances of this case. It does not point to assuming reductions to important policy objectives, namely affordable housing. In addition to the above, it is important to also mention that the Council places significant priority in reaching planning decisions on the delivery of affordable housing. LBTH is delivering substantial affordable housing, which is of course critically

		important to local and regional housing need. It is surprising in this context that, from a policy / CIL perspective, that the Council is suggesting that its proposed Charging Schedule is inherently reliant upon a reduced affordable housing target / expectation for the strategic sites. The approach lacks the caution necessary in relation to strategic sites and does not fit with the Council's proposition through their document that an especially cautionary approach has been taken. We are not aware of any document or report that demonstrates LBTH as an authority is prepared to accept below 35% as a starting point on any development, in particular strategic developments.
5.32	"The Council considers that the CIL rates as proposed can be viably accommodated on the three sites in question, due to the flexibility in the Council's affordable housing policy. For example, row 1 of Table 5 above demonstrates that where a full CIL is accommodated and the aim IRR is 13%, that affordable housing of between 25.95% and 38.4% can be delivered on these 3 schemes. It should be noted that the minimum provision of 25.95% affordable housing would be higher than the amount actually achieved in relation to the Wood Wharf scheme."	Disagree: Both CWG and BGY Regeneration Limited have serious concerns with this approach, in keeping with the comments noted above. It is not considered robust or appropriate. In the context of the further evidence prepared by the Council, a low or zero CIL rate should be applied to the strategic sites. This is what the evidence is demonstrating as a headline. It is inherently more risky and out of keeping with Government policy / guidance to apply a higher CIL rate simply on the basis that affordable housing can be substantially 'flexed'. The ability to 'flex' is, of course, necessary and useful. But, it is wholly intended to be applied at the planning application stage once all material consideration associated with determining a planning application can be considered and a judgement reached. We also disagree that 13% IRR is appropriate as a reasonable target. We will not repeat our case in this respect here since it is appropriately set out in representations and in written statements. The only reasonable and credible target IRR is 20%.
5.34, 5.35	"The Council considers that charging the CIL rates as proposed on the three sites in question would, in accordance with paragraph 29	Disagree:

	of the guidance, 'not threaten delivery of the relevant Plan as a whole'. The only adverse impact on the Development Plan is a minimal one in relation to the delivery of affordable housing. However, not charging the rates as proposed would result in a far greater impact upon the delivery of infrastructure, required to support the delivery of the Development Plan as a whole. To refer back to the tests in Regulation 14, setting the CIL rates as proposed on the three sites in question would not have a significant effect (taken as a whole) on the economic viability of development in the Charging Authority's area. The term 'taken as a whole' is stated in CIL Regulation 14(1) and implies that the viability of individual sites is not a material consideration in CIL rate setting if the impact of the CIL rates is not significant in respect of the delivery of the Development Plan. Given the imposition of CIL is minimal in respect of the affordable housing levels that must be reduced to account for it, setting the rates as proposed, appears to the charging authority, to strike the appropriate balance between the desirability of funding from CIL and the potential effects on viability of development across the area."	The strategic sites are fundamental to the delivery of the Core Strategy, including substantial new homes and jobs. The Council's own evidence (see response to para 5.16) demonstrates that a low / zero CIL rate is justified. The CIL rates currently proposed would place additional cost burden on the developments and add extra challenges to viability. This is to be avoided and Government guidance is clear that CIL should not be applied where viability is low / marginal. The imposition of the Council's proposed CIL rates on the strategic sites would not serve a positive purpose. The Council's reliance on 'taken as a whole' is misleading and overly simplistic. It ignores the key point – in accordance with the NPPF and NPPG – which isensuring the relevant plan is not threatened. For Tower Hamlets this means ensuring that the strategic sites are not threatened and that additional challenges and burdens are not placed on viability. The Council explains that not charging the CIL rates as proposed would result in an impact on the delivery of infrastructure. This is unfounded. In the context of comments set out in relation to Section 3, the Council should be assuming in-kind infrastructure is delivered through Section 106. The debate is about the mechanism for delivering infrastructure and not whether the infrastructure is in fact necessary / put at risk.
5.39	"Row 5 of Table 5 above demonstrates that CIL constitutes a very small amount of a scheme's value. This means it is unlikely to be the overriding factor in respect of the viability of the scheme."	Disagree: As per comments in relation to paragraph 5.16, we agree that the cost relative to scheme value is small. But, the Council's evidence demonstrates that no additional cost should be applied because of the challenging nature of viability (no matter how small or large). We would also note that the simple view that we are talking about small figures and a small amount relative to scheme value is misleading insofar that for schemes of such a

		large scale and significant, small figures make a significant difference (Table 4 usefully demonstrates this).
Option 2: Zero Rate Wood Wharf, Bishopsgate Goods Yard and Westferry Printworks		
5.40, 5.41	"Rows 1 and 2 of Table 4 above demonstrate that where 35% policy compliant affordable housing must be accounted for in a viability appraisal, that the schemes are unviable even without the inclusion of CIL. Representations have been made on the basis that the office rate on these sites should be reduced to zero. If so, the regulation 123 list would need to be amended accordingly to ensure that the infrastructure required for these 3 sites is mainly funded through section 106 payments. The Council believes that a zero rate on these sites would not be appropriate. The reasons for this are already discussed under Option 1 above. In addition, as the imposition of CIL makes little difference to the viability of these sites, it is clear that they are not appropriate evidence on which to base the CIL rates. The Council is also required to use an area-based approach, which involves a broad test of viability across their area as the evidence base to underpin their charge."	Disagree: As per comments above (see para 5.16), the evidence demonstrates that a CIL rate should be low or zero. Option 2 accords with the evidence. It is the preferred option for CWG and BGY Regeneration Limited. Option 2 is considered the most credible evidenced approach. In accordance with representations, it has always been proposed by CWG and BGY Regeneration Limited that whether or not a borough CIL charge is in effect, substantial Section 106 are likely for the strategic sites in order to ensure the delivery of in-kind necessary infrastructure. The consequential amendments to the Regulation 123 List in this respect appear acceptable.
Option 3: Amend Rates to Accord with Financial Contribution Secured on Wood Wharf Planning Application		
5.42	"The total financial contribution for planning obligations (or their financial equivalent) was agreed of £42,001,904 for the Indicative Scheme that was considered (see the report to committee, attached at Appendix O). A full contribution to the Mayoral CIL and SPG Crossrail requirements has also been assumed, totalling £61 million. If there is an increase in value of the development, this will allow for a greater contribution to the provision of affordable housing (and will not affect the level of the other s.106 contributions)."	Comment: Refer to DP9 memo at Appendix D.
5.43, 5.44	"When applying the CIL rates as proposed to this Indicative Wood Wharf scheme, the total CIL contribution (not accounting for a discount due to in use existing floorspace) would be £81,760,577.60. Accounting for the discount due, this would become £79,542,262 and the Crossrail contributions would remain	Comment: Refer to DP9 memo at Appendix D.

	the same. A residual s106 contribution of £19,403,831m would also be expected (please refer to page 8 of Appendix L). Therefore, if assuming a CIL world, the likely amount available for CIL would equate to £22,598,073. This amount is established by reducing the total financial contribution agreed as part of the Wood Wharf scheme (£42,001,904) by the amount that would remain under S106 in a CIL world (£19,403,831). This equates to 28% of the likely CIL liability for this scheme (assuming no discount for existing floorspace) if the Council had its CIL in place at the time of application. As it has been established that a financial contribution of £22,598,073 can be viably accommodated on Wood Wharf then the rates as proposed on this site could be reduced by approximately 72% to establish a CIL rate that did not adversely affect the viability of the development (in current market conditions)."	
5.48	"The Council considers that this option is not suitable and maintains that the rates as set out in its RDCS (updated in the Council's Statement of Modifications (ED3.5)) are indeed appropriate."	Comment: Option initially considered as worthy of exploring further, but on the basis of analysis explained in the DP9 memo at Appendix D, it is considered inappropriate.

End.

11th September 2014

Appendix B: Schedule of Comments on Viability Inputs

	Wood Wharf	BGY
Floorspace / Number of Dwellings (residential space)	Previous representations were made regarding Wood Wharf's development capacity. Whilst the BNPP appraisal is not completely aligned with the recent planning application the assumptions are not unreasonable	In relation to the residential, the 1,464 dwellings noted in the BNPP evidence base relates to the site wide capacity of which circa 60% is in Tower Hamlets with 40% in Hackney. The previous BNPP appraisal included in the August 2013 BNPP CIL Viability study included 754 residential dwellings and circa one million sq ft of commercial space. The Council's position on this has changed albeit it is not clear why.
Commercial space		In relation to the commercial space, the appraisal continues to incorporate the commercial space from Hackney which inflates the viability of the LBTH element
Affordable Housing	The BNPP revised appraisals include scenarios with 35%, 30% and 25% affordable housing. DS2 are aware from information that is publically available that the affordable housing percentage was agreed at 25% with a review mechanism that could result in the delivery of up to 40% affordable housing over the lifetime of the development. LBTH's minimum affordable housing requirement, subject to viability is 35% and whilst the BNPP evidence now suggests that the CIL liability can be incorporated through flexibility in affordable housing requirements, none of the present day scenarios, even at 25% affordable housing, is technically viable. On a present day basis, even without the imposition of CIL, the scheme was technically unviable at 35% AH. We do not agree with the use of what are inherently volatile growth assumptions for the purposes of setting an appropriate CIL rate on what are extremely challenging sites. The BNPP appraisals with a reduced quantum of 25% AH remain unviable.	The current application submitted with a target of 10% affordable housing given the viability constraints. Subject to verification by LBTH which is currently in progress. BGY is a significantly constrained site for which there is no scope for additional development costs and whilst BNPP state that CIL is small as a percentage of development costs the CIL liability for BGY equates too many millions of pounds. We do not agree with the use of what are inherently volatile growth assumptions for the purposes of setting an appropriate CIL rate on what are obviously challenging sites in commercial terms. The BNPP appraisals with a reduced quantum of 25% AH remain unviable.
Phasing	DS2 are unaware of the phasing agreed as part of the site specific discussions. The BNPP Viability Study states that the phasing of the development is in accordance with the planning application	The BNPP Viability Study states that the phasing of the development is in accordance with the planning application

External Costs	BNPP have adopted 15% of the build costs for external costs. DS2 note that an additional allowance of £150 million is included in the appraisal for 'abnormals'.	BNPP have adopted a figure of 15% of the build costs for external costs. The BGY cost plan has an additional figure of circa 55% of the total build costs for abnormals, externals and some other costs. In comparing the overall costs between the BNPP site wide appraisal and the model included in the Financial Viability Appraisal (to support the planning application) whilst the base build costs appear reasonable BNPP have significantly underestimated the on-costs, when compared to the site specific appraisal that accompanies the planning application, that is those relating to externals, abnormals and preliminary costs / OH&P
Revenue	BNPP have included a figure of £865 per sq ft for the private residential. Commercial values included at £40 psf and £30 psf for the office and retail with a 6% and 5.5% yield respectively and 36 months' rent free for the office and 24 months' rent free for the retail. The hotel is included at a cap value of £225,000 per room. Car parking at £25,000 per space and ground rents at £4,500 per private unit.	BNPP have appeared to undertake a site wide appraisal that is one that includes land in both LBTH and LBH. The blended rate included in the LBTH appraisal is not unreasonable based upon market evidence for the whole site however only when taking into consideration the Hackney component of the scheme as well (i.e. two 40+ storey residential towers). In setting the CIL rate in LBTH it is only the development with the Charging Authority area that should be considered.
Maturity Factor	BNPP have chosen to incorporate a full present day value and then an additional 10% on the base values for the third and fourth phases. There is no rationale for this and this is something that the landowner would be unwilling to accept if this was proposed on the site specific viability. The 'maturity' factor simply over inflates the residential values which are based upon market evidence according to BNPP. The present day modelling is therefore not as such, and the viability is artificially inflated unreasonably	BNPP have chosen to incorporate a full present day value and then an additional 10% on the base values for the third and fourth phases. There is no rationale for this and this is something that the landowner would be unwilling to accept if this was proposed on the site specific viability. The 'maturity' factor simply over inflates the residential values which are based upon market evidence according to BNPP. The present day modelling is therefore not as such, and the viability is artificially inflated unreasonably

Build Costs	BNPP have included a figure of £235 per sq ft on the GIA for the residential element. This figure includes a cost for external works. The office rate is included at £200 per sq ft and the retail at £185 per sq ft. DS2 are of the opinion that, at the very least, the external costs should have been an additional cost given the scale of works proposed on the site. There is no justification from BNPP as to why the Wood Wharf works are deemed to be less expensive than those included in the Bishopsgate Goods Yard appraisal. Further clarification is required.	BNPP have now included a figure of £275 per sq ft on the GIA for the residential build costs which they refer to as being at the bottom end of the range stated in the BGY submission to the Examiner's Questions (specifically the G&T cost plan). Additional costs have been included for the construction of the basements. Office and retail costs have been included at £200 per sq ft and £185 per sq ft on the GIA respectively. The increase in base build costs is welcomed however analysis of the entire cost budget is required (see below).
Contingency	A 5% contractor's contingency has been included by BNPP. As pre the previous representations, this reflects more 'standard' development, and a 10% contingency has previously been noted as being more appropriate for strategic development (where the full scale of potential liabilities is unknown).	A 5% contractor's contingency has been included by BNPP. As pre the previous representations, this reflects more 'standard' development, and a 10% contingency has previously been noted as being more appropriate for strategic development (where the full scale of potential liabilities is unknown).
Abnormal Costs	The BNPP appraisal includes a cost of £150m for abnormals. It is unclear from the BNPP model how these costs have been cash flowed	The BNPP appraisal includes £7.32 m for remediation, £4.392m for other matters and £20m for the ELLX. The site also incorporates a range of above and below ground constraints for which the costs are not fully understood. As such, the contingency (as noted above) should be reflective of the likely cost implications.
Professional Fees	The BNPP appraisal includes 12% professional fees. As previously noted, this is at the bottom end of a range on projects where there are multiple architects and a range of constraints and 14% is still deemed to be a reasonable figure for strategic sites of this scale and complexity.	The BNPP appraisal includes 12% professional fees. As previously noted, this is at the bottom end of a range on projects where there are multiple architects and a range of constraints and 14% is still deemed to be a reasonable figure for strategic sites of this scale and complexity.
Gross to Net Ratios	BNPP have adopted a 70% gross to net ratio. No further comments.	BNPP have adopted a 70% gross to net ratio. No further comments.
Existing Floorspace	BNPP have included a floorspace calculation comprising 2,634 sq m of residential and 16,691 sq m of commercial. The information was derived from the CIL form submitted with the recent planning application	No comments in relation to existing floor space however please note comments relating to the Current Use Value

Mayoral CIL, Crossrail, S106 & Borough CIL	Mayoral CIL & Crossrail £47,839,830 / Borough CIL £45,337,908. BNPP note that the liabilities are in accordance with the submitted schedule with modifications	The BGY liabilities for the planning application scheme are subject to final verification
Residual S106	Residual 106 calculation of £1,220 per unit and £5 psf for the commercial included. This is unrealistic and assumes provision of significant in-kind infrastructure through CIL. Please see comments made elsewhere in these representations on this matter	Residual 106 calculation of £1,220 per unit and £5 psf for the commercial included. This is unrealistic and assumes provision of significant in-kind infrastructure through CIL. Please see comments made elsewhere in these representations on this matter
Current Use Values	Industrial use value of £5.3m per Ha has been included. Based on a site area of 7.26 Ha this amounts to £38.38m. BNPP have included a 20% premium to incentivise the landowner resulting in a benchmark of £46.176m. No mention of 'sense checking' is made. Given the site's planning designation as a location for mixed use development, DS2 are of the opinion, based on evidence in the locality, that the Market Value for the site (i.e. the value at which the site owner is incentivised to sell in accordance with the NPPF, is higher). Further explanation required.	BNPP have maintained the £17.808m site value. There is no explanation on how this figure has been derived. In the updated Hackney CIL work (*BNPP CIL Addendum Viability Assessment July 2014*) a site value of £30m has been incorporated so explanation required as to the inclusion of a £17.808m site value for what is the larger part of the site (two-thirds of the site area is within LBTH). As noted above, the site appraisal presented by BNPP includes development that reflects that applied for across the whole site (i.e. both LBTH and LBH). Further explanation required.
Construction Period	No comment	A phasing plan has been submitted as part of the recent planning application.
Sales Rate	No further comment (12 sales per month with 30% off-plan)	No further comment (12 sales per month with 30% off-plan)
Letting Fees	For a joint agency instruction we would expect a cost of 15% of the first year ERV as noted in previous representations	For a joint agency instruction we would expect a cost of 15% of the first year ERV as noted in previous representations
Sales Fees	For residential, the combined sales and marketing costs are at 3.75%. This is too low as noted in our previous representations. Our current experience remains that an all-in figure of circa 5% is reasonable which takes into consideration the on-site costs for the duration of the project (for two agents) and the wide ranging costs of a national and international sales campaign. As an overarching comment, the BNPP total sales and letting fees for the residential and commercial elements of the scheme are significantly underestimated	For residential, the combined sales and marketing costs are at 3.75%. This is too low as noted in our previous representations. Our current experience remains that an all-in figure of circa 5% is reasonable which takes into consideration the on-site costs for the duration of the project (for two agents) and the wide ranging costs of a national and international sales campaign. As an overarching comment, the BNPP total sales and letting fees for the residential and commercial elements of the scheme are significantly underestimated
Marketing	As above.	As above.

Profit Measure	BNPP acknowledge that a 20% IRR is often targeted however then note that '*developers have agreed to proceed with large development schemes in London on much lower IRRs in the expectation of growth in the market over the life of their development increasing the profitability of their scheme significantly*'. This is misleading. Where this has occurred, the target rate of return remains at 20% IRR (the IRR is ungeared i.e. finance is not included, but the target rate inherently reflects the finance costs) however the agreement for the purposes of a planning consent at a lower return is not an acknowledgement that the target rate has reduced but that there are a number of factors, including market improvements that can improve the project return. The benchmark to which viability is assessed for the strategic sites remains a 20% IRR below which a scheme is technically unviable. The BNPP evidence lacks analysis or commentary on the IRR. The BNPP evidence is now focused upon the variance between the with and without CIL scenarios and does not acknowledge the lack of baseline viability that the strategic sites now purvey.	BNPP acknowledge that a 20% IRR is often targeted however then note that '*developers have agreed to proceed with large development schemes in London on much lower IRRs in the expectation of growth in the market over the life of their development increasing the profitability of their scheme significantly*'. This is misleading. Where this has occurred, the target rate of return remains at 20% IRR (the IRR is ungeared i.e. finance is not included, but the target rate inherently reflects the finance costs) however the agreement for the purposes of a planning consent at a lower return is not an acknowledgement that the target rate has reduced but that there are a number of factors, including market improvements that can improve the project return. The benchmark to which viability is assessed for the strategic sites remains a 20% IRR below which a scheme is technically unviable (and there is an associated risk that the scheme will not be implemented). The BNPP evidence lacks analysis or commentary on the IRR. The BNPP evidence is now focused upon the variance between the with and without CIL scenarios and does not acknowledge the lack of baseline viability that the strategic sites now purvey.
Growth Assumption	We are of the view that growth assumptions for the purposes of CIL are not appropriate. The use of growth modelling on larger strategic projects can be a way in which planning obligation outputs can be optimised, at the applicant's risk, however growth modelling is not appropriate for the purposes of setting a robust CIL rate in accordance with the NPPG (para 17) that refers to current costs and values	We are of the view that growth assumptions for the purposes of CIL are not appropriate. The use of growth modelling on larger strategic projects can be a way in which planning obligation outputs can be optimised, at the applicant's risk, however growth modelling is not appropriate for the purposes of setting a robust CIL rate in accordance with the NPPG (para 17) that refers to current costs and values

Appendix C: Legal Note on Interpretation of CIL Regulations 73 and 73A

CANARY WHARF AND BISHOPSGATE GOODS YARD

LBTH's CIL Charging Regime and Provision of Strategic Site Infrastructure

1. CONTEXT OF THIS NOTE

1.1 This note comments on London Borough of Tower Hamlets' ("**LBTH**") options for managing the provision of infrastructure on strategic sites in the borough as it brings forward its Community Infrastructure Levy ("**CIL**") regime pursuant to the Community Infrastructure Levy Regulations 2010 ("**CIL Regs**").

1.2 Specifically we are asked to comment on the most suitable option for developers such as Canary Wharf and Bishopsgate Goodsyard Regeneration Limited ("**BGRL**") to treat the provision of infrastructure on strategic sites as in-kind provision sufficient to reduce their CIL liability when LBTH's CIL regime is introduced.

1.3 This note has been prepared for Canary Wharf and BGRL in respect of the wider LBTH CIL examination process.

2. SUMMARY

2.1 LBTH have put forward three options regarding CIL setting for strategic sites on which in-kind provision of infrastructure is likely:

(a) Option 1: Charge full CIL for strategic sites, with in-kind provision for infrastructure being offset against CIL via Reg 73 land-payments pursuant and/or Reg 73A infrastructure payments pursuant.

(b) Option 2: Zero-rate Wood Wharf and Bishopsgate Goods Yard (and Westferry Printworks together referred to in this note as "the strategic sites") for CIL so that in effect the developer pays no CIL but provides the relevant infrastructure (and makes any financial contributions) by way of a s106 agreement.

(c) Option 3: a mixed CIL/s106 option whereby a discounted CIL rate is applied to the strategic sites (circa 30%) with the developer providing the relevant in-kind infrastructure (secured in a s106 agreement) but no associated financial contributions (which are covered by the discounted CIL payment).

2.2 LBTH favours Option 1. There is, however, considerable uncertainty as to how this would work in practice and in particular how Reg 73A would be interpreted. LBTH and its advisors have, in various documents, come up with four interpretations as to how Reg 73A may be applied (refer section 6 below). Further, if Option 1 is pursued, it is clear that considerable additional work would need to be done to ascertain the correct allocation of in-kind infrastructure items as site-mitigants (under s106 agreements) and infrastructure payments in order to avoid double charging. This is also true of Option 3.

2.3 By contrast, Option 2 represents an approach that is clear, simple and low risk. For these reasons, it is the most suitable approach to this issue for strategic sites and Opportunity Areas in the Borough.

3. BACKGROUND

3.1 The CIL tariff regime was established in an attempt to reduce reliance on s106 agreements and create a "*fairer, faster and more certain and transparent*" system. It was stated in early CIL Guidance[1] that "*Levy rates will be set in consultation with local communities and developers and will provide developers with much more certainty 'up front' about how much money they will be expected to contribute.*" A consistent theme throughout the introduction of the CIL regime remains that it is targeted to deal with delivering strategic infrastructure, rather than making individual sites acceptable. The current 2014 CIL guidance ("**Guidance**") notes: "*Charging authorities should think strategically in their use of the levy to ensure that* ***key infrastructure priorities*** *are delivered to* ***facilitate growth and the economic benefit of the wider area.***" (our emphasis)

3.2 It is established that in order to achieve this balance of providing both strategic infrastructure and site specific mitigation without over-burdening developers, the CIL regime should not double charge developers by seeking CIL for items on a council's Reg 123[2] list (known as "relevant infrastructure") as well as requiring provision for the same items through the use of s106 agreements.

3.3 However, where a developer seeks to offset its liability through provision of in kind infrastructure, it is less clear how the CIL Regs will operate to avoid "double charging" (i.e. to prevent a developer both paying CIL for the infrastructure item and actually providing an item). To this end the CIL regime recognises offset payments in the form of:

(a) **Land payments** under Reg 73 which provide for offset from CIL for a land payment based on the value of the land provided (but not the value of the infrastructure); and

(b) **Infrastructure payments** under Reg 73A which provide for infrastructure payments only where the council is satisfied that: *"the infrastructure to be provided — (i) is relevant infrastructure, and (ii) is not necessary to make the development... acceptable in planning terms".*

3.4 In practice, the application of Regs 73 and 73A alongside the continued application of the s106 agreement regime and CIL, is not yet clear. In seeking to understand the relationship between CIL and the s106 obligations LBTH:

3.4.1 obtained a legal opinion from William Upton dated 17 July 2014 ("**Opinion**") on this issue (attached at **Annex 1**); and

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[1] CLG *Community Infrastructure Levy: An overview*, May 2011. Replaced by the Government's Planning Practice Guidance dated 6 March 2014.

[2] Regulation 123 is the requirement for a published list of infrastructure projects or types of infrastructure that the charging authority intends will be, or may be, wholly or partly funded by CIL. A council cannot collect s106 monies to spend on items within its Reg 123 list.

3.4.2 emailed CLG seeking clarification of the application of these regulations ("**CLG Email**")[3]. CLG responded via email dated 11 July 2014. Both emails are attached at **Annex 2.**

3.5 The Opinion and CLG Email are commented on further below, but both demonstrate the uncertainties regarding the how the CIL Regs will be applied to prevent double charging in relation to in kind provision of infrastructure.

4. LBTH OPTIONS

4.1 LBTH is currently developing its CIL charging regime and its Reg 123 list. The proposed Reg 123 list establishes broad categories of infrastructure as relevant infrastructure, including for example "health", "education", "infrastructure for public art", etc. It does not seek to identify specifically required strategic infrastructure - for example it does not specify a secondary school in *X* ward with a capacity for *X* pupils. Nor does LBTH propose (as far as we are aware) to set up a separate list establishing clearly what infrastructure items may be provided by way of infrastructure payments (as allowed by the Guidance).

4.2 This raises particular issues for strategic sites where developers themselves propose to bring forward relevant infrastructure, in that it is not clear to what extent and how Regs 73 and 73A will be used to ensure developers are not double charged.

4.3 LBTH puts forward three options to manage the interplay of CIL and provision of in-kind infrastructure in its "*Community Infrastructure Levy Charging Schedule Examination: Supplementary Evidence request*" ("**Supplementary Evidence**"):

(a) Option 1: Charge full CIL for strategic sites, with in-kind provision for infrastructure being offset against CIL by:

(i) Land-payments pursuant to Reg 73; and/or

(ii) Infrastructure payments pursuant to Reg 73A.

(b) Option 2: Zero-rate the strategic sites for CIL so that in effect the developer pays no CIL but provides the relevant infrastructure (and makes any financial contributions) by way of a s106 agreement.

(c) Option 3: a mixed CIL/s106 option whereby a discounted CIL rate is applied to the strategic sites (circa 30%) with the developer providing the relevant in-kind infrastructure (secured in a s106 agreement) but no associated financial contributions (which are covered by the discounted CIL payment).

4.4 LBTH favours Option 1, and maintain that this is a suitably cautious approach to proceeding with their CIL-setting. Canary Wharf Limited and BGRL, and their advisors, consider there to be significant uncertainty as to how Regs 73 and 73A may be applied to avoid double charging (in terms of both paying full CIL and providing infrastructure) where Option 1 is taken forward.

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[3] Email dated 10 July 2014.

5. OPTION 1

Limited application of Reg 73 – land payments

5.1 It is accepted that land payments under Reg 73 are very limited in nature. The only offset against CIL which can be made is the value of the land (in accordance with a set formula) transferred to the local authority, on which the local authority may develop relevant infrastructure.

5.2 The Opinion and the CLG Email do not deal with Reg 73 in any detail. We note from a practical point of view it is considerably less likely that developers of strategic sites would transfer part of their site to the council for the council to develop out. Developers are unlikely to be willing to lose control of (potentially) a key part of a strategic site. This is both in land-ownership terms, but also in terms of estate management and delivery of development, as there are no requirements on the council to deliver specific items of relevant infrastructure within set time-periods. The Guidance conversely recognises that it is a benefit of payments in kind that such payments "*can...enable developers, users and authorities to have more certainty about the timescale over which certain infrastructure items will be delivered.*"

Uncertainties in the application of Reg 73A – infrastructure payments

5.3 The application of Reg 73A is less certain. The general consensus amongst the legal community is that it is not clear what infrastructure would satisfy Reg 73A and in particular the extent to which infrastructure can be said to be both "relevant infrastructure" and "not necessary" to make the development acceptable. The risk of Option 1 is that developers will effectively end up being double charged in terms of both paying full CIL and providing infrastructure.

6. INTERPRETATIONS OF REG 73A IN THE OPINION AND CLG EMAIL

6.1 LBTH, seemingly in an attempt to address this uncertainty regarding Reg 73A (so as to support Option 1), obtained the Opinion and also wrote to CLG seeking confirmation of the correct interpretation. We do not consider either document significantly assists LBTH as, within the two documents, four potential interpretations of Reg 73A are raised. This demonstrates the current uncertainty as to how Reg 73A will be applied.

6.2 The Opinion in fact acknowledges the uncertainty regarding the scope of infrastructure payments under Reg 73A:

(a) It notes legal commentators foresee little scope for infrastructure payments under Reg 73A, given the restrictive wording noted above, and agrees that "*this is not an easy part of the regulations*".

(b) It states, in respect of the wording of Reg 73A, "*the effect of [the] restriction in regulation 73A(7)(b) is far from clear*", and that apart from brief coverage in the CIL guidance,[4] "*there is otherwise no clear guidance on the issue of*

[4] The Opinion references the standalone February 2014 Guidance on Community Infrastructure Levy which is now incorporated (with minor changes) into the Planning Practice Guidance.

"in-kind" payments particularly when it comes to the consideration of larger sites".

(c) The Opinion notes several interpretations as to how Reg 73A can be read to provide scope for infrastructure payments to offset against CIL, but states that "*[u]ltimately, the proper interpretation of regulation 73A is for the courts*".

6.3 We address each of the four interpretations raised in the Opinion and CLG Email briefly below.

Interpretation 1 - Multiple Applications

6.4 The Opinion proposes a way to avoid this legal uncertainty created by the words "necessary to make the development acceptable in planning terms". It suggests that developers for strategic sites should apply for the infrastructure separately to the main planning application and then offer the infrastructure as an in-kind payment against the CIL payable for the main development. The rational is that a separate infrastructure permission would not then fall foul of the Reg 73A requirements as the separate infrastructure permission cannot be said to be necessary to make the main development acceptable in planning terms – as it is an entirely separate permission. The result of this approach is that multiple applications would need to be made for a strategic site. We consider that approach is both convoluted and unnecessary and, in any event, ineffective to achieve the desired result:

(a) The combined effect of Reg 73A(7)(b)(ii), 73A(12)(e) and 73A(2) is to prevent the use of in kind infrastructure provision to reduce CIL liability where that provision is necessary to make the development acceptable. Contrary to the proposition contained in the Opinion, it appears not to matter whether the infrastructure is delivered pursuant to the main planning permission or a separate one. The prohibition applies in respect of CIL liability arising out of "a chargeable development" (Reg 73A(2)). Thus there appears to be no opportunity for any such cross-subsidy between permissions.

(b) Even if this were wrong, this "separation" of the development is artificial and does not prevent the council from taking the view that the infrastructure is necessary to make the development acceptable in planning terms. Such an approach runs a considerable risk that the planning application for the main development is refused or is granted subject to Grampian conditions or section 106 obligations effectively linking the two planning applications.

(c) It would considerably complicate the process of obtaining planning permission for strategic sites and place a much greater burden on developers in preparing, consulting on, and paying fees for multiple permissions rather than one.

(d) The council's costs of managing and determining applications would also increase.

(e) Whilst there is nothing in planning law to prevent a multi application approach the overall development would have to be considered for the purposes of the environmental impact assessment process so as to avoid falling foul of the rule against "salami slicing".

(f) We do not consider a court would approach the matter in this way to give effect to CIL, should this matter come before the courts.

Interpretation 2 - Allocation of infrastructure items as site specific or additional provision

6.5 The Opinion notes an interpretation of Reg 73A that where physical infrastructure (say, a school) is being provided partially to directly mitigate effects of the development, but with additional capacity beyond that required directly by the development, that additional capacity can be the subject of an infrastructure payment.

6.6 This interpretation is also raised by LBTH in the CLG Email where a useful example of a school is used to demonstrate this point; LBTH states in this approach it would need to:

> 2. Secure the proportion of the infrastructure that directly mitigates the development via a S106 agreement – only this portion will likely comply with the 3 tests set out in Reg 122. For example, if a development produces a child yield of 100 Section 106 would only be an appropriate mechanism to secure the proportion of an education facility which would be required to accommodate 100 children – this may be only one tenth of a school, for instance.
>
> 3. Secure the remaining portion of the infrastructure via CIL as this portion may not technically be making the development acceptable in planning terms as it is serving a wider population than that which can be attributed to the development. An agreement in accordance with Reg 73A(8) must be entered into to secure this proportion. Going back to the school example this would be a in-kind CIL payment commensurate to nine tenths of the school's value.

6.7 We consider that this interpretation does fit with the purposes of CIL in that it enables CIL, infrastructure payments and s106 obligations to co-exist with in-kind delivery in a manner that does double charge a developer. As such it is in line with the Guidance which is clear that "*there should be no actual or perceived 'double dipping' with developers paying twice for the same item of infrastructure*" (para 093 and 099).

6.8 However it is not an easy outcome for councils. LBTH, in the CLG Email goes on to state "*Clearly, this is a very convoluted method for delivering infrastructure and would present a multitude of challenges for a Charging Authority and for a developer to the extent that the infrastructure is simply not delivered.* "

6.9 To make it work it would be a significant task to split out what is necessary to make the development acceptable and what is strategic infrastructure (and can be provided as an infrastructure payment). The Reg 123 list would need to be clear on this division.

Interpretation 3 - Deeming relevant infrastructure "not necessary"

6.10 As a concluding section, the Opinion notes an alternative view on how "*necessary to make the development acceptable in planning terms*" may be interpreted following the introduction of CIL and the Reg 123 list. This proposes that where an item, again taking education as an example, appears on the Reg 123 list:

(a) The developer cannot then be required to provide any education infrastructure by way of a planning obligation to make the development acceptable in planning terms (Reg 123(2)); and

(b) An education provision cannot be said to be "necessary to make the development acceptable in planning terms", as the council has already determined that funding of the education infrastructure is to be by way of CIL. The council can then chose to accept in-kind provision of a school, and/or land for a school as a land payment or infrastructure payment.

6.11 This interpretation is a way of addressing the uncertainty of Reg 73A but it is not clear that it would be followed by the courts. In particular the drafting of Reg 73A(7)(b) raises difficulties for such an interpretation. It provides:

> (7) A charging authority may not accept an infrastructure payment unless—
>
> (b) it is satisfied that the infrastructure to be provided—
>
> (i) is relevant infrastructure, and
>
> (ii) is not necessary to make the development granted permission by the relevant permission acceptable in planning terms;

6.12 If adopting Interpretation 3 (set out at paragraph 6.10) is correct, we query why both (i) and (ii) are needed, as this approach assumes relevant infrastructure (i.e. infrastructure on the Reg 123 list) is de facto deemed not to be necessary to make the development acceptable in planning terms. As such only (i) or (ii) would be needed.

6.13 We note also that it is not clear if this approach would fully align with the purpose of CIL as we note that (using the Council's school example above) technically 1/10 of the school would be necessary to make the development acceptable in planning terms (and so should not be the subject of an infrastructure payment). This is recognised by CLG in its response to the CLG Email which states:

> It would not be right for a developer to reduce their liability by offering to provide, for instance, a school which local policies clearly anticipated being delivered through section 106. The regulation 123 list (or any list provided by the Council indicating projects they would be willing to consider as payment in kind) should provide a clear indication of projects that are intended to mitigate the **wider impacts of development**, which are not therefore **necessary to make individual developments acceptable**, and which may be suitable for payments in kind.

6.14 We accept that there is legal uncertainty on the point and it is not yet known how the courts would interpret this part of the CIL Regs.

Interpretation 4 – infrastructure allocated in a local plan is always necessary to make development acceptable

6.15 As well as Interpretation 2 (set out from paragraph 6.5 above), LBTH raised an alternative interpretation in the CLG Email. This is that Reg 73A should be interpreted so that the whole of any infrastructure to be provided under a local plan site allocation is considered to be required to make the development acceptable in planning terms. It concludes that:

> In this instance there is no circumstance under which we [LBTH] will be able to accept infrastructure payments. A local authority can't deliver infrastructure outside of the scope of the Local Plan. Securing on-site infrastructure under S106 may not be possible due to the three tests in Reg 122.

6.16 This cannot be the correct outcome. It would mean that where an infrastructure item is noted for provision on a strategic site in the local plan, there would be no scope for a developer to provide additional capacity (beyond that required for the development) within that item without being double charged. This is because the developer would still be liable for CIL but would not be able to make an infrastructure payment to off-set any additional capacity provided. In this instance it may simply not be feasible to provide the infrastructure; using LBTH's school example, it is unlikely to be feasible to construct a 100 pupil school (to cater for the immediate impact of the development) where the local plan requires a 1000 pupil school.

7. APPROPRIATE APPROACH FOR IN-KIND PROVISION OF INFRASTRUCTURE ON STRATEGIC SITES

7.1 In summary, we consider there is a substantial risk for developers in following Option 1. While at a policy level there is no debate that there should be no double dipping, it is acknowledged by LBTH's own counsel that this area of law is unsettled and it is not clear how this is to be achieved in respect of in-kind provision.

7.2 Even if it is assumed Interpretation 2 (set out from paragraph 6.5) is correct, the difficulties faced in actual application are acknowledged by LBTH. Development of a strategic site could feasibly see developers and councils having to negotiate/enter into:

7.2.1 s106 agreements for the portions of any infrastructure items on the Reg 123 list which is deemed to be necessary to make the development acceptable;

7.2.2 infrastructure payment agreements, for any "additional capacity" provided in the infrastructure items provided;

7.2.3 land payment agreements; and

7.2.4 managing residual CIL liability payments.

7.3 For strategic sites such an approach cannot be said to meet the government's desire to create a "*fairer, faster and more certain and transparent*" system.

7.4 Without further judicial or government clarification it cannot be said that Option 1 represents a cautious approach which gives developers of strategic sites adequate comfort that they cannot be double charged for in-kind provision of infrastructure. For the reasons set out above there is a considerable risk of legal challenge to this approach.

8. PREFERRED OPTION - OPTION 2

8.1 We consider that until greater clarification is given on the in kind payments provisions, the most legally certain approach for both developers and LBTH, in terms of how infrastructure and funding will be established and provided on strategic sites, is Option 2.

8.2 Reg 13 clearly provides for a charging authority to set nil rates. The relevant infrastructure can then be provided by s106 obligations (provided it is not in the Reg 123 list i.e. via a generic exclusion such as is proposed by LBTH in appendix F(1) to the Supplementary Evidence) and the developer would not be double charged.

8.3 We note that other councils have sought to take this approach with respect to large regeneration sites providing strategic infrastructure, including:

8.3.1 London Borough of Hammersmith & Fulham.

8.3.2 South Gloucestershire Council.

8.4 This approach also avoids the need to negotiate multiple agreements and undertake the detailed assessments that would be required under the other Options as to what is necessary to make the development acceptable and what proportion would be an infrastructure payment.

9. ALTERNATIVE PREFERRED OPTION - OPTION 3

9.1 Option 3 would also provide certainty, although would require considerable careful and complex analysis to ensure appropriate discounted rates were imposed to take account of the actual costs of infrastructure provision to satisfy the strategic need and as site-specific mitigation.

9.2 The Reg 123 list would also need to be appropriately crafted to avoid any overlap; the current form of the list is too generic in terms of the infrastructure it identifies to meet this purpose and would need considerable work, including consideration and specification of individual strategic projects.

9.3 Considerable work would also be needed to establish what proportion of any infrastructure items would be necessary to make the development acceptable in planning terms and which would be an infrastructure payment.

10. CONCLUSION

10.1 Option 2 is, in practical terms, simple to apply and would produce an outcome that is certain, which would be to the considerable advantage of both developers and the Council. It is the most legally sound option. For these reasons, Option 2 represents the most suitable approach for strategic sites and Opportunity Areas in the Borough.

Clifford Chance and Hogan Lovells
12 September 2014

Appendix D: Memo relating to in-kind infrastructure, CIL versus planning obligations

MEMO

dp9

To: **Anne-Marie Berni (LBTH)**
Joseph Ward (LBTH)

From: **Craig Tabb (DP9)**

Date: **11th September 2014**

Re: **Comparison of Section 106 Heads of Terms scenarios with and without LBTH CIL for Strategic Sites**

Anne-Marie / Joseph,

At our meeting on 27th August 2014 in respect of the Council's current consultation on its proposed CIL Charging Schedule, you asked DP9 to consider what the anticipated Section 106 'Heads of Terms' would be for the strategic sites in two scenarios: (i) without a LBTH CIL in effect; and (ii) with a LBTH CIL in effect.

This memo provides DP9's opinion on the matter, on behalf of Canary Wharf Group and Bishopsgate Goods Yard Regeneration Limited.

Wood Wharf Example

I have based this memo on the recent Strategic Development Committee Report (21st July 2014) for the proposed Wood Wharf development (this forms Appendix O to the Council's document 'Community Infrastructure Levy Charging Levy Examination: Supplementary Evidence Requested by the Examiner' (30th July 2014) (ED5.21). It provides up-to-date appropriate information on the infrastructure required to mitigate a strategic development. The Report includes, at paragraphs 3.3 and 3.4, a list of planning obligations ('Heads of Terms') that are to be entered into by way of a legal agreement prior to the Council granting planning permission. As one would expect for a scheme of its size, the proposed Wood Wharf development requires – in compliance with scheme specific assessment (most notably in relation to Environmental Impact Assessment and Transport Assessment) – substantial mitigation in order to make it acceptable in planning terms.

CIL / Section 106 Context

By way of context the CIL regime was established in an attempt to reduce reliance on Section 106 Agreements for strategic infrastructure with Section 106 obligations being used to mitigate the impact of the development, so that without that mitigation the development would be unacceptable in planning terms.

As a result, a Section 106 obligation can only constitute a reason for granting planning permission for a development if, in accordance with the CIL Regulations (2010, as amended), it is:

- necessary to make the development acceptable in planning terms;
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development.

The above tests are the tests for planning obligations irrespective of whether a local authority has introduced a CIL charge, or not.

Under the CIL Regulations a charging authority may accept CIL payments by way of land payments (Reg 73) or infrastructure payments (Reg 73A) where land or relevant infrastructure is provided by the person who is liable to pay the CIL. There is, of course, an ongoing debate and point of disagreement between us in relation to how in practice the provision of land or infrastructure on strategic sites can be payments in kind under the CIL Regulations. This is because of the uncertainty of how the CIL Regulations should be interpreted. You are aware of CWG and BGY Regeneration Limited's position, which is that in the absence of any case law or guidance on the relevant CIL Regulations, there is a very high likelihood that strategic development will be unintentionally double-charged (i.e. pay substantial Section 106 and CIL and this would not have been taken into account as part of the Council's CIL setting evidence).

The Council's 'Revised Draft Planning Obligations Supplementary Planning Document' (October 2013) ("draft SPD") states the following: "*In Tower Hamlets, planning obligations will be used to mitigate the impact of development, which without that mitigation, would render the development unacceptable in planning terms*" (para 1.5). The SPD goes on at paragraph 1.7 to explain, in broad terms, the purpose of CIL. It is clearly focused on providing infrastructure that is generally needed across the whole Borough and not specific to the mitigation necessary for individual developments. Paragraph 2.4 of the document explains that the Council may accept CIL payment in-kind in respect of the strategic sites, but there is no analysis of what this really means in practice and what is likely to be realistically possible under the specific terms of the CIL Regulations. The various tables in paragraph 2.5 onwards attempt to make clear whether item by item infrastructure will be secured and paid for through Section 106 planning obligations or CIL. But, the tables blur the distinction and do not take into account infrastructure which is provided as an integral part of a development and is necessary to mitigate the effects of that specific development and make it acceptable.

Analysis of Wood Wharf Example

It is in the context of the above, that I have attempted to analyse the Wood Wharf 'Heads of Terms' and conclude whether the each Head would remain as a Section 106 planning obligation assuming the Council's CIL had taken effect. For ease of reference, the Heads are, as follows:

	Current Head as set out in Wood Wharf Strategic Development Committee Report
	Financial Obligations
1	Enterprise and employment
2	Leisure facilities
3	Sustainable transport
4	Public open space
5	Carbon emissions off-setting
6	Heritage works
7	Streetscene improvements
8	Transport improvements (various)
9	Navigational safety
10	Monitoring
11	Crossrail
	Non-Financial Obligations

12	Affordable housing
13	Primary school
14	Health facility
15	Idea store
16	Leisure facility
17	Enterprise, Employment, Apprentice, Training and End User Engagement Strategy
18	Parking permit free development
19	Travel Plans
20	Cycle Hire Docking Stations
21	Electric Vehicle Charging Units
22	Car Clubs
23	Safeguard and maintenance of on-site public realm and highways
24	Public Art Strategy
25	Reed beds
26	Biodiverse roofs
27	Tern rafts
28	Affordable Retail Space Strategy
29	Assistance in delivering bridge(s) over South Quay
30	Mitigation of radio and TV signal effects

Analysing the above in respect of planning obligations versus CIL is not a straightforward task. In fact, it highlights the difficulties in splitting what is infrastructure necessary to make the development acceptable and relevant infrastructure payable through CIL so as to avoid double charging.

Having considered the Council's draft Planning Obligations SPD, it is reasonable to conclude that most (if not, all) of Heads 1-11 are anticipated to remain as planning obligations.

The main point of debate / disagreement is in relation to the in-kind provision (i.e. Heads 12-30). It is not possible to be definitive about Heads 12-30: it is unknown at this stage and will depend on exactly what proportion of the each item of infrastructure is necessary to make the specific development acceptable, what proportion is relevant infrastructure for CIL and what could potentially be made as a payment in-kind. To illustrate:

- Heads 25, 26 and 27 – these are good examples of Heads that are clearly specific to the development. They would not otherwise be needed. They would remain as planning obligations.

- However, Heads 13-16 – in reality are likely to be part Section 106 and part CIL. Take the example of the health facility to be provided at Wood Wharf. The Council's draft Regulation 123 List states that 'health facilities' are CIL infrastructure and this is supported by the Council's draft Planning Obligations SPD. However, it is clear that the Wood Wharf development requires new health provision to make the development acceptable in planning terms. The issue that would need to be determined in each case is whether it was all needed to make the development acceptable or can an element be said to be provision of strategic infrastructure which is now covered by CIL. In a CIL regime it would, however, need to be established what proportion of the health provision was site specific and necessary to make the development acceptable and what proportion was "strategic infrastructure" which falls under CIL and whether it can be provided as a payment in kind under Regulation 73A. The same can be said, for example, about the provision of a primary school.

My attempt to produce an item by item definitive position of planning obligation or CIL has simply highlighted the challenges and difficulties in this respect for large strategic developments. In reality, for

each piece of in-kind infrastructure, a significant amount of work would need to be undertaken in order to:

- Firstly, ascertain what is necessary to make the development acceptable.
- Secondly, draft / revise the Regulation 123 List to exclude such items.
- Thirdly, then set out which items could be infrastructure payments (payments in-kind via Regulation 73A).

In my opinion, the above is exactly what the Council say is "*a very convoluted method for delivering infrastructure and would present a multitude of challenges for a Charging Authority and for a developer*" in its email to CLG (attached at Appendix E of the 'Community Infrastructure Levy Charging Levy Examination: Supplementary Evidence Requested by the Examiner' (ED5.21)). I agree. Clearly, the exercise and analysis I have attempted to undertake serves to demonstrate the need for caution. The likelihood is that, for strategic development, substantial Section 106 costs will remain for in-kind infrastructure provision.

Because of the nature of the current Regulations and the Council's assumptions on residual Section 106 in its viability evidence base (i.e. no account for in-kind infrastructure provided through planning obligations), there is a clear risk that a development such as Wood Wharf would be double charged i.e. full CIL and full Section 106.

End.

DP9 Ltd
10th September 2014