

IN THE MATTER OF

**LONDON BOROUGH OF TOWER HAMLETS
COMMUNITY INFRASTRUCTURE LEVY –
THE REVISED DRAFT CHARGING
SCHEDULE AND CROSSRAIL**

OPINION

1. I have been asked to advise London Borough of Tower Hamlets, regarding the way in which the requirements for funding Crossrail have been taken into account in setting the rates in their CIL Charging Schedule that has been submitted for examination. The Council has received objections from the Mayor of London with regard to this issue, dated 10th March 2014, which includes a copy of an Opinion obtained by them from Paul Brown QC as an appendix. Both the Mayor of London and Transport for London have made further written submissions with regard to the Questions for the Examination, where this issue forms part of Question 11.

2. I am aware that the Council wishes to disclose the contents of this Opinion as part of the evidence before the CIL examination. This Opinion considers the issue under the following matters:
 - a. The Crossrail payments: the Mayor's CIL and Crossrail SPG;
 - b. The application of CIL and the Crossrail SPG to new development, following the adoption of the RDCS;
 - c. The way in which the Crossrail SPG has been taken into account in the valuation evidence for the RDCS;
 - d. The consideration of the RDCS and the Crossrail funding issue in the light of the tests for the current examination.

3. There are a number of the legal tests that need to be satisfied, which will be familiar to the participants in the Examination. Given that, I do not propose to set them out in detail here. This matter turns on the proper interpretation of the CIL Regulations, and the CIL Guidance (2013), and the way in which CIL relates to the general planning regime.
4. There is an extensive evidence base that supports the Revised Draft Charging Schedule (“RDCS”). The way in which the issues raised by the objectors have been considered is explained in the *Regulation 19 – Consultation Statement* (ED3.2). Further detail on the methodology that has been used has also been set out in the Council’s responses to the Examiner’s Questions. The likely level of payments that the Mayor could seek under the Crossrail SPG, in relation to the Mayoral CIL and the Borough’s CIL, are usefully summarised in Examination Documents ED5.1 and ED5.2, including for the specific area of North Docklands. These have informed my consideration of the issue.

The Crossrail payments: the Mayor’s CIL and Crossrail SPG

5. The Mayoral CIL came into effect on 1 April 2012. Tower Hamlets is one of the Boroughs listed in Zone 2 in the Mayoral CIL Charging Schedule, which requires all development to pay a charge of £35 per m² on new floorspace (subject to minor exceptions). There is no issue with this, although it is notable that there is no discussion of the Crossrail SPG in the Examiner’s report on the Mayoral CIL’s examination.
6. The Mayor will also seek planning obligations to contribute towards the costs of funding Crossrail from certain development in London, and has adopted a Supplementary Planning Guidance “*Use of Planning Obligations in the Funding of Crossrail, and the Mayoral Community Infrastructure Levy*”. This SPG was first introduced in July 2010, and the current version was adopted in April 2013 (and this is the one included as ED2.3). This guidance is referred to in Policy 6.5 of the London Plan, which deals with funding Crossrail and other strategic transport infrastructure, and the wider Policy 8.2 on Planning Obligations cross-refers to this. Policy 6.5B states that this SPG guidance would be produced having

regard to a number of factors – and not just to the total sum that needs to be raised

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- “a. the requirement for contributions from development of up to £600 million under the arrangements for funding Crossrail agreed with Government;
- b. central Government policy and guidance;
- c. strategic and local considerations;
- d. the impacts of different types of development in particular locations in contributing to transport needs; and
- e. economic viability of each development concerned.”

7. The Crossrail SPG identifies those developments in respect of which additional Crossrail contributions should be sought in accordance with national policy guidance on planning obligations (as it was at that stage – it is now also covered by reg.122 of the CIL Regulations). For the reasons set out in the SPG, this covers office, retail and hotel development, but excludes housing. It then uses standard charges and formulae for calculating what are said to be the fair and reasonable contributions to be sought, and sets out how these should be applied in the specific London localities and for the different kinds of development. It also acknowledges that the level of contribution sought should not duplicate the £35 Mayoral CIL charge, so that the figures expressed in the SPG incorporate this charge in the total sum sought. The way in which it is then applied to each site is that the s.106 contribution is identified as a top-up payment to the Mayoral CIL charge.
8. As a result of the locational factors, most of the Tower Hamlets area is excluded from the need to provide additional s.106 contributions for funding Crossrail. However, s.106 contributions are sought from development in the Central London contribution area and in the areas around the new Crossrail stations – and a very high level of additional contribution is sought for the area around the new Isle of Dogs Crossrail station, referred to as the “North Docklands area”. Indeed the contribution sought for the North Docklands area is at a higher level than that sought in central London – at £190 per m² for offices, £121 for retail and £84 for hotel development. The top-up provisions means that this represents an additional contribution of £155, £86 and £49 respectively to the £35 CIL rate.

9. There are a number of further matters to address. Paul Brown QC mentions that the GLA has advised him that the current Tower Hamlets Charging Schedule would be likely to result in a shortfall of £22-£30 million in payments for Crossrail (his §4, although the basis for the calculation itself is not set out anywhere). But the Crossrail SPG itself accepts that the s106 contribution is variable, and will depend on the site specifics. There can therefore be no specific total sum of money that new development in the Isle of Dogs area will provide, as it will depend on the results of the negotiations at the time of the planning applications – unlike the Mayoral CIL.
10. The point is also made by the GLA that Crossrail is infrastructure that is critical to unlocking the development potential of London, and of areas such as Whitechapel, Canary Wharf and the Isle of Dogs. I know that the Council does not dispute the strategic importance of Crossrail. However, in the case of the Crossrail SPG, we are dealing with the question of planning obligations, and what is required to mitigate the impact of a development. As the London Plan itself states, development proposals must address strategic as well as local priorities in the planning obligations they provide (policy 8.2C). That will be part of the negotiations. It should also be noted that the provision of a s.106 contribution from development located in the Isle of Dogs area cannot be justified on the basis that it will help provide infrastructure for other areas, or to make up the shortfall in funding from those other areas. That is contrary to reg.122.
11. The overall problem really comes down to the issue of competing infrastructure priorities when there is a limited pot that a development can provide. *The Panel's Report on the London Plan Crossrail Alterations* in 2010 identified the same potential problem. On the evidence before them at that time, they assumed that it would not arise on the facts. But they did make it clear that Crossrail was only part of the wider picture:
- “6.6 However, if contributions to such facilities are necessary to make the development acceptable in terms of local or site impact mitigation, as Circular 05/2005 requires, there can be no question of Crossrail “sweeping the pot”. This is because if those other necessary facilities, such as improved access to the highway, cannot then be funded, the development proposed would be unacceptable and should not be permitted to go ahead. A further consequence of development not going ahead would be that funding for Crossrail itself

would likewise then not be secured from the development concerned. To that extent, the advice in Circular 05/2005, if stringently adhered to (as it ought to be) establishes effective safeguards for the funding of *necessary* social and economic infrastructure while also militating against any undue relative priority being given to Crossrail.”

12. The Mayor of London (and TfL) have also raised the objection that the Council’s approach taken to the possible Crossrail s.106 contributions might lead to the need for funding to be taken from other infrastructure projects in order to address any shortfall in Crossrail funding. Whilst this is an important consideration, it is an issue that the Mayor would face in seeking to raise these s.106 contributions in any event. It is also a risk that the Mayor has sensibly always acknowledged, as part of the wider demands relating to TfL’s budget.¹ The Borough itself is tasked with seeking an appropriate balance between the competing priorities.

13. I note that the Mayor has made it clear that he is due to review the Mayoral CIL, and its relationship with the Crossrail SPG, in 2014. The funding arrangements agreed by the Mayor with central government were that £600million would be sought from a combination of the Mayoral CIL charges and planning obligations made in the light of the Crossrail SPG. The wording of the London Plan (para 6.23) is that this is what the funding agreement “envisages”, and that £600million “might” be raised towards the cost of the project from developers, split evenly. This does allow for a different split between the CIL and the section 106 contributions – and an increase in CIL from across London would reduce the individual contribution expected by the Crossrail SPG on individual sites. The TfL’s report on “*Update on Planning Obligations*” to its Finance and Policy Committee (27 November 2013) discussed what has happened to date.

¹ For instance, when considering the draft Mayoral CIL Charging Schedule itself, in Evidence and Supporting Material (Mayor of London, August 2011), at para 2.61.

The application of CIL and the Crossrail SPG to new development, following the adoption of the RDCS.

14. Once the Council's CIL is adopted, any new development in the Borough will need to pay two CIL charges, for the Mayor and for Tower Hamlets, and then meet any remaining section 106 obligations. In deciding whether to grant planning permission or not, the Council will take account of the way in which the CIL charges will help fund other infrastructure in the Borough (taking into account the regulation 123 list of exclusions), as well as the Mayoral CIL.

15. This may be stating the obvious, but there is a tendency in the Mayor's objections to elide the Mayor's CIL and the SPG on Crossrail, as if they were of the same importance. The fact that the Crossrail SPG was discussed by the Inspectors at the examination into the Alterations to the London Plan (February 2010 report), does not elevate the SPG above its normal status – it remains supplementary guidance about potential planning obligations. They have also been adopted under different processes and tests. The CIL charge has been calculated as a general levy, but the SPG payment is only justified in relation to the impact of the specific development, and can be variable.

16. It is worthwhile to compare the situation now, before the Tower Hamlets CIL is introduced, and the situation afterwards. Negotiations now would start from the position that “a contribution towards the full cost of all such provision that is fairly and reasonably related in scale and kind to the proposed development and its impact on a wider area” (assuming London Plan 8.2F(b) has been followed), including affordable housing. If there are viability issues, a balance would have to be struck between the competing priorities, both strategic and local (London Plan 8.2C). The Crossrail SPG s.106 contributions would not sweep the available pot.

17. The Mayor's Crossrail SPG acknowledges that the Mayor will “seek” the level of contribution set out in the SPG, which uses a tariff-based approach. Great importance is also now attached to the need to ensure the viability of new development (NPPF 173). The SPG also acknowledges the “importance of ensuring that questions of development viability are taken into account in planning decisions” (para 3.34), and that the Mayor will consider carefully any case in

which it can be demonstrated that making a contribution under this guidance would have an effect on the economic viability of a development “or would otherwise be unreasonable or disproportionate.”

18. Whilst the GLA’s objection here emphasises that Crossrail is the Mayor’s top transport priority, the London Plan itself acknowledges the somewhat obvious point that transport is only one of the main objectives of the development plan. There are other competing plan objectives in the London Plan and in the Local Plan, both of which form part of the development plan.

19. If any development does not provide adequate contributions, even taking into account the infrastructure that will be funded by the Mayoral CIL and by the Council’s CIL, then it could be refused on those grounds. On the other hand, it may be that the development is granted permission despite this apparent conflict with the development plan and other requirements. Indeed, it would be part of the overall planning balance whether the adverse impacts of doing so would significantly and demonstrably outweigh the benefits of granting permission (NPPF para 14).

The way in which the Crossrail SPG has been taken into account in the valuation evidence for the RDCS.

20. There is a dispute about the conclusions that can be drawn from the valuation evidence. I note that the GLA has made the point that if this RDCS is adopted, and the Crossrail SPG was then applied in full as well, then “a significant proportion of development within LBTH’s area becomes unviable”. This is not what that the current valuation evidence shows. Following the revision of the rates in the draft Charging Schedule, the only area in Tower Hamlets where there can be a dispute about the full application of the Crossrail s.106 contribution is in the North Docklands area.

21. The Council’s valuation evidence demonstrates that all development in the Borough is able to support the Tower Hamlets CIL, the Mayoral CIL, the residual

s.106 requirements and the full s.106 contribution that is sought by the Crossrail SPG, apart from the area referred to as North Docklands. The rates set out in the Revised DCS would not therefore threaten the delivery of development in the Borough in those areas.

22. In the North Docklands area, the picture is more complicated. The Borough has restricted its North Docklands Area to a tighter area than the area identified in the Mayor's SPG, and within this tighter area:

- a. Housing development is not put at risk. In any housing development, the Mayoral CIL will require a levy of £35 per square metre, and the Council's CIL will require £200 (as it is in Zone 1). The Crossrail SPG will not then require a further contribution, as it is limited to offices, retail and hotels floorspace.
- b. In any mixed use development, it will be a complex calculation, and will depend on the actual office, retail or hotel floorspace being sought (subject to 500 sq.m. threshold for the Crossrail SPG to apply). However, the Wood Wharf example that has been analysed suggests that mixed development will not be put at risk. There would not be the loss of £22m-30m alleged by the GLA from this development, assuming that the Council's CIL is set at the rates suggested.
- c. In a 100% office development, once the Mayoral CIL is taken into account, and a buffer of 25% is used, then there is an issue about the appropriate CIL rate. The remaining pot of £125 per m² is not sufficient to fully fund the Crossrail s.106 top-up contribution (of £155) as well as the £50 Tower Hamlets CIL.

23. An appropriate balance needs to be struck on office development. If the Mayor's recommendation that he should sweep the pot and that the Borough's CIL rate should be a £0 rate for offices in North Docklands was adopted, the office part of the mixed use development at Wood Wharf would not contribute to the Borough's infrastructure at all, despite the evidence that it can afford to do so without threatening the development's viability.

24. The Council has proposed to set a rate of £50 for office development in this area, to contribute to the provision of the different types infrastructure required. The net effect of this in the theoretical world of 100% office schemes in this area would be that £110 would go to fund Crossrail (with the Mayoral CIL of £35 and a Crossrail s.106 top-up of £75), and £50 would go to the Borough's infrastructure needs. This represents about a 60:40 split overall. This also assumes that none of the money that has been identified as part of the 'buffer' is then available to help fund more of the s106 contribution.²

25. Furthermore, since the recent recovery in the market, I am instructed that the evidence is that there is even less likelihood that the CIL rates have been set at the margins of viability. The further data that has been published and has become available shows that the pot is in the order of £540 per m². On this basis, there is no issue with any development in North Docklands, and the CIL rate has been set rather conservatively. The CIL Guidance does recommend looking not just at the time of charge setting but also throughout the economic cycle (para 30) – and we have been at the bottom of the cycle.

The consideration of the RDCS and the Crossrail funding issue in the light of the tests for the current examination.

26. The Examiner must be satisfied that the Council has satisfied the requirements of Regulation 14 of the CIL Regulations. Whilst this regulation has been recently amended, it remains the case for the purposes of this Examination that it is for the Council to strike the right balance. As the Examiner has noted, the amendments made in 2014 to make this an objective test do not apply to this examination.

27. Under regulation 14(1), the charging authority “must aim to strike what appears to the charging authority to be” an “appropriate balance” between:

- a. “The desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the

² It is worth remembering that the 25% 'buffer' is a statistical device, which is intended to ensure that the CIL rate is not set at the limits of viability. That money does not disappear – and a viability assessment of the development itself would still include the £42 per sq.m. that this 25% buffer represents (on a total £167 pot).

development of its area, taking into account other actual and expected sources of funding; and

- b. “The potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area.”

28. The CIL Guidance gives further help on what is the appropriate balance – that the levy is expected to have a positive economic effect on development across the area and the authority should show and explain how its proposed levy rates will contribute towards the implementation of its relevant Plan and support the development of its area (para 8). It should of course also be noted that the CIL Guidance recommends that charging authorities should use an area-based approach, which involves a broad test of viability across their area as part of the evidence base to underpin their charge (para 23). The Act requires (s.211 (7A)) a charging authority to use '*appropriate available evidence*' to inform their draft charging schedule, and - as the Guidance recognises - the available data is unlikely to be fully comprehensive or exhaustive (para 25).

29. It is known that in Tower Hamlets, as in many other boroughs, the total estimated cost of the relevant infrastructure required far exceeds the revenue it can expect from CIL (see ED2.3: Infrastructure Planning and Funding Gap Report - Revised Draft Charging Schedule). The CIL is being adopted to fund part of this total cost.

30. There is a third relevant requirement in regulation 14:

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

31. The effect of reg.14(3) is limited to the Mayoral CIL, as it refers only to the “rates set by the Mayor”. But it does mean that the Mayor is entitled to the ‘top slice’ for the Mayoral CIL from any development. That is part of the legislative scheme (as Mr Keith Holland, the examiner of the Mayoral CIL, confirmed at para 28 of his report). But this applies only to the CIL rate, and not any other charge or contribution that may be sought. The Crossrail SPG is not part of this ‘top slice’.

32. The Crossrail SPG is relevant to the setting of the CIL rate as the Council is expected to take account of the possible impact of section 106 obligations, including those that the Mayor would be seeking. This arises as a general consideration, as part of “The potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area”.
33. I note that the GLA’s Opinion (at §8 to §10) relies on the Mid-Devon Examiner’s report for the point that the development plan remains the starting point for the consideration of any planning application and that “the key test is whether or not the assumptions upon which the proposed level of CIL are based would undermine the delivery of the DP targets...” That is a test that applies to both parts of the reg.14(1) balance, as a failure to fund infrastructure will also undermine the delivery of development. The draft Charging Schedule also has to be judged in the light of all of the development plan policies and priorities, and not just the policies in support of Crossrail.
34. The Council has explained how CIL applies across the whole of the Borough, and the North Docklands Area is a small part of this. With regard to that area, there should be no issue that most development is able to comfortably support the suggested rates. The difficult issue of how to strike the appropriate balance arises with regard to schemes that are 100% office development. Whilst office floorspace can be successfully included in a mixed-use development, even the full rate of the Crossrail SPG (£190) would make office development unviable. A lesser rate has to be expected, if there is to be office development, outside of a mixed-use scheme. Some allowance also has to be made for the provision of other infrastructure in order to avoid undermining the strategic policies of the development plan.
35. It is because the Council is tasked with identifying the “appropriate balance” on the appropriate available evidence that the Charging Schedule has proposed a rate for offices in the disputed North Docklands area of £50 per m². This still gives the lion’s share of the pot in favour of Crossrail (£35 CIL plus £75 SPG). The Council has acknowledged the importance of Crossrail, and has not treated the Crossrail SPG as if it were “minor” or “dispensable” (as alleged by the GLA). But nor does

it treat it as being entitled to sweep the pot in the face of other priorities, or to be treated as the equivalent of the Mayoral CIL. A balance has had to be struck, and as the CIL Guidance mentions (para 28), there is room for some pragmatism in finding the appropriate balance. In the event, the economics of an individual development may mean that this issue does not arise in practise. The positive change in the economic climate since the appraisals were carried out may already have ensured this.

William Upton

6 Pump Court

Temple, London

6th May 2014

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COMMUNITY INFRASTRUCTURE LEVY –
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OPINION

Assistant Chief Executive (Legal Services)
Tower Hamlets Legal Dept,
Town Hall,
Mulberry Place,
5 Clove Crescent,
London E14 2BG