Community Infrastructure Levy Regulations 2010 (As Amended)

**Representations made on the Proposed Modifications to the Community Infrastructure Levy Revised Draft Charging Schedule**

**Torbay Council October 2016**

**Introduction**

The following summarises representations received on, and issues arising from, the consultation to Proposed Modifications to Torbay’s Community Infrastructure Levy Revised Draft Charging Schedule.

This document was the subject of consultation between Monday 5th September 2016 and Monday 17th October 2017. This replaced an earlier consultation on Proposed Representations that commenced in August 2016. Only one representation (from Torquay Neighbourhood Forum) was received on this earlier consultation and the Council does not consider that any interests have been prejudiced by incorporating this representation into the Revised Proposed Modifications. For simplicity, these are referred to as the Proposed Modifications in this document.

This document supplements the Consultation Statement dated September 2015 which sets out representations and the Council’s responses to previous stages of the CIL, and the rationale for the proposed Modifications.

The representations have been considered carefully and the Council does not consider that further Modifications need to be made to the Submission Draft Charging Schedule as amended by the revised Proposed Modifications. However, it is noted that a number of objections have been made which invite further Modification. The Council welcomes the Independent Examiner’s recommendations to these and confirms that it will accept amendments to the Schedule if deemed necessary by the Examiner.

The Council has set out areas where it particularly considers further Modifications could strengthen the CIL should these be recommended by the Examiner. This is intended to assist him and not to limit his scope to make comments.

**Main areas of representations**

There were 12 responses to CIL. The following sets out what the Council considers to be the main issues arising from the Consultation. A fuller breakdown of representations and responses is set out in the table of comments. Several issues have been raised previously and the Council’s September 2016 Consultation Statement remains relevant. The Council considers the main issues to be:

1. Clarify the extent of CIL and s106 for the Berry Head to Sharkham Point Special Area of Consultation to ensure that impacts on the SAC are addressed and to eliminate double dipping.
2. Object to seeking CIL on sites of 1-3 dwellings in Charging Zone 2 i.e. elsewhere in the built up area.
3. Objections from Neighbourhood Forums to the use of s106 rather than CIL for large sites within Future growth Areas, in terms of (1) perverse incentive to develop greenfield sites and (2) Impact upon Neighbourhood Plan projects.
4. Exceptional Circumstances relief could undermine neighbourhood Plan Projects.
5. Objection that the Infrastructure Funding Gap has not been clearly justified.
6. Representation from developers that s106 Obligations should apply to all strategic sites that are developed (including south of White Rock) and not just Future Growth Areas in the Local Plan.
7. Objection to seeking CIL from sheltered housing developments.
8. Objection that the Instalments policy has been made less generous and will harm viability.

**Summary of Council’s response to these issues**

The Council’s summary response to these is set out below. A more detailed assessment is contained in the table of comments.

1. **Clarify the extent of CIL and S106 for the Berry Head to Sharkham Point Special Area of Consultation to ensure that impacts on the SAC are addressed and to eliminate double dipping.**

Noted. The Council has been in discussion with Natural England and proposes to amend the Regulation 123 List to make recreational Impact on the limestone grassland a CIL item; and address development impacts upon greater horseshoe bat and other habitats a s106 matter.

1. **Object to seeking CIL on sites of 1-3 dwellings in Charging Zone 2 i.e. elsewhere in the built up area.**

The recommendations in the Viability Update are noted. The Council’s reasons for taking a different approach are set out in the September 2016 Consultation Statement on page 7-8.

1. **Objections from Neighbourhood Forums to the use of S106 rather than CIL for large sites within Future growth Areas, in terms of (1) perverse incentive to develop greenfield sites and (2) Impact upon Neighbourhood Plan projects.**

As set out in the September Consultation Statement and in the table below, the Council considers that seeking S106 from large sites within Future Growth Areas is the most effective way to secure sustainable development on such sites. They are likely to have higher infrastructure costs in terms of unlocking and serving the sites as well as strategic landscape and biodiversity mitigation. They are also subject to higher affordable housing requirements (which require a s106 Obligation irrespective of CIL). There is greater flexibility to negotiate the phasing of infrastructure provided through s106, and require elements such as the highways, flooding, landscape/biodiversity matters to be provided upfront, and directly by the developer where necessary. Therefore the Council considers that S106 Obligations are more effective than CIL.

CIL is not being used as a tool to influence the location of development, and it is likely that s106 requirements would be higher than the equivalent CIL according to the current Draft Planning Contributions and Affordable Housing Supplementary Planning Document.

It is noted that other Authorities, including South Somerset and Mid Devon are also using this approach in recognition of the limitations of CIL in dealing with large sites.

CIL is not intended to undermine the delivery of Neighbourhood Plans, and it is recommended that the Neighbourhood Plans identify key projects that the Forums are seeking to target the neighbourhood portion upon. Should specific projects be identified that are key to delivering the Neighbourhood Plan, it is suggested that they are likely to be eligible for S106 Obligations.

1. **Exceptional Circumstances relief could undermine Neighbourhood Plan Projects.**

 Matters that are key to delivery of the Neighbourhood Development Plan may be more effectively addressed through s106 obligations, where they meet the tests of lawfulness. However, the delivery of the Local and Neighbourhood Plan is likely to be an important consideration in deciding whether exceptional circumstances relief from CIL should be granted. The Council would have no objection to recommending a minor further Modification to Mod 19 to indicate that: *“The Council will have regard to the effect of granting Exceptional Circumstance relief upon the delivery of sustainable development, including projects and policies identified in the Local and neighbourhood Plans (when Made)”.*

However, the Council considers that as the Charging Authority, the final decision whether to grant exceptional circumstances relief rests with the Council.

1. **Objection that the Infrastructure Funding Gap has not been clearly justified.**

This does not appear to be a principal objection, but an issue arising out of 3 above. The Infrastructure Delivery Study was part of the evidence base for the Torbay Local Plan 2012-30 and identified a total funding gap of around £160m of which £52m is considered to be critical (note that the figure is millions rather than thousands). There is no suggestion that this can be funded through developer contributions in its entirety. The Council has borrowed £20 million towards the cost of the recently completed South Devon Highway. This is a pivotal piece of infrastructure for which there is a significant funding gap, which will need to be funded through the public purse (with concomitant cuts in other services) if not through CIL.

1. **Representation from developers that S106 Obligations should apply to all strategic sites that are developed (including south of White Rock) and not just Future Growth Areas in the Local Plan**

This application relates to land South of White Rock, which narrowly missed allocation in the Adopted Torbay Local Plan but is being actively promoted. As such it may come forward during the Plan period. The comment is also of relevance to Sladnor Park, Maidencombe (see Pegasus’ comments on sheltered housing).

CIL is not used to determine the acceptability of development nor to influence development location. With this in mind, proposals will need to determined on their planning merits. Should a strategic development come forward outside of the Future Growth Area, it is likely that they would have infrastructure requirements comparable to those within Future Growth Areas and that the Council would negotiate exceptional circumstances relief. Accordingly, the council would not object if the Examiner recommended a further modification to make all strategic sites CIL exempt. A definition of “strategic” will need to be provided. The Local Plan (Glossary p262) indicates that the Local Plan is likely to consider the definition to be development of 30 dwellings or more, or development of importance to meeting overall Local Plan or NPPF objectives”.

1. **Objection to seeking CIL from sheltered housing developments**

The Burrows Hutchinson Viability Update considers that sheltered housing is unlikely to be jeopardized by CIL. The Council agree that a clear distinction between extra care and “sheltered” or “supported” housing needs to be provided, and the Use Classes Order C2 and C3 may be the best way to make this distinction. Notwithstanding this, the Objection from Pegasus relates to a proposed retirement village. The suggestion in (6) above that all strategic sites could be CIL exempt would overcome the specific concern for most retirement villages.

1. **Objection that the Instalments policy has been made less generous and will harm viability.**

The Council is able to amend its instalments policy outside of the CIL examination process. However, it notes that Cavanna Homes have indicate practical difficulties with the time scale for instalments in Mod 17 should the examiner consider this to be justified, with the caveat that it does not consider instalment of longer than 24 months to be appropriate, because it removes certainty of receiving CIL moneys.

**Conclusions**

Having considered the representations submitted, the Council considers that the major issue of substance is the Council’s proposed approach of seeking CIL smaller sites (where viable) and seeking to negotiate sites of 15+ dwellings within Future Growth Areas through S106 Obligations. Note that this is a longstanding approach from the Draft Charging Schedule (from February 2015) and is being used elsewhere.

There are a number of issues relating to viability of sites; particularly sites within of 1-3 dwellings within Zone 2 and sheltered housing. With regard to the former, the Council’s reasons for deviating from the Burrows Hutchinson Viability Update findings are set out in the September 2016 Consultation Statement. With regard to sheltered housing, the Council considers that the Viability Update indicates that CIL would be viable.

On the basis of the representations made on the Proposed Modifications, the Council does not wish to make further Modifications. It does however intend to publish a revised Reg123 List to clarify the use of CIL to mitigate the effects of development in the Brixham Peninsula on limestone grassland in the SAC.

However, the Council are happy for the Examiner to recommend further Modifications should he deem these necessary to make CIL acceptable.

In particular the Council considers that may be a case for using s106 rather than CIL for any strategic sites that arise. Whilst the Council is able to amend the instalments policy and Reg123 list outside of the Examination process, the Council would welcome the Examiner’s views in the light of comments made by Cavanna Homes and Natural England.

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| **Representations on the Proposed Modifications to Torbay’s CIL Submission Draft Charging Schedule and the Council’s Response.**  |
| **National Consultees/Neighbouring Districts** |
| Natural England  | PM1 | Clarify the extent of CIL and S106 for the Berry Head Special Area of Consultation to ensure that impacts on the SAC are addressed and to eliminate double dipping.  | Agreed. The Council propose to amend the Reg123 List so that CIL is used to cover impacts from all development in the Brixham Peninsula on the limestone grassland between Berry Head and Sharkham Point. Impact of development on Greater Horseshoe Bats and other biodiversity would continue to be a CIL item.  |
|  Environment Agency  | PM2 | No concerns or comments.  | No objection noted  |
| Network Rail  | PM3 | No specific comment, but would ask that strategic projects identified in Network Rail’s Western Route Study-Long Term Planning Process are considered for future CIL/S106 funding.  | Noted. The major rail investment in Torbay is likely to be Edginswell Station, which is closely related to the Torquay Gateway Future Growth Area, and growth in the surrounding area. S106 Obligations are being sought for this (subject to the 5 Obligation pooling limit).  |
| Teignbridge District Council  | PM4 | General observation that Torbay has a lower rate of CIL than Teignbridge due to s106 requirements and the focus on CIL upon smaller urban sites.  | General observations noted. The Council considers that it has set CIL at a relatively low level in to order to protect development viability. As noted elsewhere, Torbay intends to seek infrastructure contributions for S106 Obligations from strategic sites: whereas Teignbridge seeks CIL from all sites. Therefore the viability picture is likely to be slightly different with each areas’ approach.  |
| **Partner Organisations/Forums**  |
| Torquay Neighbourhood Forum  | PM5 | Reiterate previous objection that the neighbourhood portion should be increased, in recognition that S106 and not CIL is being used for major developments in Future Growth Areas. Conservation Areas should be subject to a charge of £70 per sq m. Revert to a mid level charge of £30 per sq m for Charging Zone 2 (built up areas not within deprived areas)Exclude self build properties from CIL.  | The neighbourhood portion is set out in the CIL regulations (59A). Increasing the neighbourhood portion would jeopardize funding of key Baywide infrastructure.**Conservation Areas:** The Council has reviewed the charging zone maps to take into account likely viability. Many conservation areas are also in areas of serious deprivation with correspondingly low property values (and within Charging Zone 1). There are more spacious Conservation Areas such as the Lincombes and Warberries. However, house prices in these areas are not significantly higher than other “good” areas of Torquay. The Council considers that a blanket charging Zone based upon Conservation Areas would risk being a policy making designation rather than one based on viability. Conservation areas already enjoy protection under the Planning (Listed Buildings and Conservation Areas) Act 1990, Chapter 12 of the NPPF and Policy SS10 of the NPPF. **Mid Range Charge for the built up area.** The Revised Proposed Modifications, and Revised Draft Charging Schedule propose this rate of CIL, and support from Torquay Neighbourhood Forum for this is noted. **Self Build Housing.** Self Build Housing is exempt from CIL. The Draft Charging Schedule (with Proposed Modifications) sets out clearly that Mandatory exemptions from CIL must be claimed before development commences.  |
| Paignton Neighbourhood Forum  | PM6 | Maintain objection to exclusion of sites within Future Growth Areas from CIL. Seeking CIL on sites of 1-14 dwellings in these areas does not overcome the objection. Charging CIL of £30 per sq m for sites of 1-3 dwellings in Zone 2 (Built up area outside Deprived Areas) does not conform to the CIL Viability Addendum Report. Not heeding advice on these sites increases the likelihood of a perverse situation where greenfield development is encouraged. Suggest a charge of £70 per sq m for Zone 4 (Future growth Areas) Support reference to safeguard the vitality and viability of town centres in relation to Commercial CIL.  | **Strategic Sites** The Council’s overall approach is to seek infrastructure contributions for strategic sites through S106/S278 Agreements. This is in recognition that the strategic infrastructure requirements from such sites are more likely to be significant than from small sites. Policy H2 sets a higher affordable housing target for large greenfield sites, which also impacts upon viability. In addition s106/s278 Obligations allow for provision of some infrastructure before development commences and is easier to phase, as opposed to CIL which can only be collected after development has commenced. Seeking infrastructure contributions from strategic sites through S106 rather than CIL is not intended to advantage such sites, but is intended to aid the negotiation of infrastructure provision on strategic sites. The Council has proposed a Modification to seek CIL from sites of less than 15 dwellings in Future Growth Areas, as such smaller sites are unlikely to incur the same level of strategic infrastructure costs as larger sites. **Sites of 1-3 dwellings in the built up area.**  The Council’s reasons for seeking CIL on such sites are set out in the main Consultation Statement.  |
| Brixham Neighbourhood Forum | PM7 | Object to charging CIL on sites of 1-3 dwellings within the built up area, contrary to the Viability Update. Object that CIL is not sought on Future Growth Areas- no evidence has been provided that CIL would render development unviable if charged at £70 per sq m. Object that CIL is not justified by infrastructure requirements.Object that the Council’s discretionary circumstances relief policy could undermine Neighbourhood Plan objectives. Clarify in the CIL Charging Schedule that where site enabling works render development unviable, then CIL will be reduced.  | **Sites of 1-3 dwellings** The Council’s reasons for seeking CIL on such sites are set out in the main Consultation Statement.**Use of S106 Obligations within Future Growth Areas.** The viability evidence indicates that larger sites are likely to be able to afford CIL. However, under this approach the gamut of strategic infrastructure is likely to be required through CIL. Larger sites within Future Growth Areas are likely to have higher costs of unlocking in terms of strategic infrastructure. The Council also seeks education and other Contributions that do not apply to smaller sites, as set out in the Written Ministerial Statement and Planning Practice Guidance on the use of “tariff style” contributions. S106 Obligations can also be phased more effectively than CIL to ensure upfront delivery of necessary infrastructure. Therefore the Council considers that it is more effective to use s106 Obligations for large sites within Future Growth Areas. **Balancing CIL with infrastructure requirements.** It is noted that this does not relate to Modifications. The Forum has correctly identified Reg 14 of the CIL Regulations, as well as the Torbay Infrastructure Delivery Study (2011). The Infrastructure Delivery Study was part of the evidence base for the Torbay Local Plan 2012-30 and identified a total funding gap of around £160m of which £52m is considered to be critical (note that the figure is millions rather than thousands). There is no suggestion that this can be funded through developer contributions. The Council has borrowed £20 million towards the cost of the recently completed South Devon Highway. This is a pivotal piece of infrastructure for which there is a significant funding gap, which will need to be funded through the public purse (with concomitant cuts in other services) if not through CIL. The Council considers that the use of S106 Obligations for strategic sites will ensure that there is a clearer guarantee that contributions raised for an area will be spent in the area where development arises. This is likely to exceed the “neighbourhood portion” of CIL. **Exceptional Circumstances Exemption.** The Council’s Submission Draft Charging Schedule proposed to offer Exceptional Circumstances relief, although a modification has been proposed to make it slightly more restrictive. The Council will consider the views of Neighbourhood Forums, Brixham Town Council and other in order to ensure that Neighbourhood Plan priorities are not undermined in offering Exceptional Circumstances Relief. However, it considers that the discretion whether to offer relief is with the Council as Charging Authority. Where site deliverability matters would render development unviable, then development would need to be refused since it could not be made acceptable in planning terms. The issue of Churston Broadway is a specific application where the Council is seeking a dedicated right turn into the site as in as a site acceptability matter, as a s278 Agreement. In such a case, if development was un viable because of (a relatively modest) access requirement, CIL exceptional circumstances relief would need to be sought.  |
| Collaton St Mary Residents Association | PM8 | Object to charging CIL on 1-3 dwellings in Zone 2 (elsewhere in the built up area) as it will deter brownfield development.Object to approach of using s106 rather than CIL for large sites in Future Growth Areas as this will encourage greenfield development.  | See more detailed response to Paignton Neighbourhood Forum above and the Council’s main Consultation Statement. The issue of sites of 1-3 dwellings in Zone 2 is noted.The Council considers that s106 is a more effective tool for achieving sustainable development in Future Growth Areas. Such areas are likely to have higher infrastructure costs, and a higher infrastructure requirement than sites within the built up area. Policy H2 of the Local Plan imposes a higher affordable housing requirement upon large greenfield sites (30% as opposed to 20% for brownfield sites) which will have a greater impact on viability, S106 Obligations can require strategic infrastructure to be provided up front, which cannot be so easily achieved through CIL. The Council is not seeking to use CIL to incentivise or discourage the location of development, but has based its proposals upon likely viability. |
| **Developers**  |
| Stride Treglown for Deeley Freed. | PM9 | Approach within Zone 4 i.e. zero CIL and use of s106 to fund major infrastructure should apply to all sites of strategic significance. Background information provided on land south of White Rock which was promoted through the Local Plan and continues to be promoted.  | The Council agrees that CIL is not used to determine or influence the planning merits of proposals. The approach for determining major sites that may come forward is set out in the Adopted Local Plan (particularly Policy SS2). On this basis, were a strategic greenfield site to be promoted, it is likely that it would have similar infrastructure requirements and viability characteristics to the Future Growth Areas designated in the Local Plan. In such circumstances it is likely that the Council would negotiate Exceptional Circumstances relief from CIL on the basis that s106/S278 Agreements would be more effective in delivering the needed infrastructure. Whilst the Council does not wish to recommend a further Modification to codify this approach in its CIL Charging Schedule; it would not object to such a modification if the Independent Examiner considered it to be appropriate. However, such a Modification should only apply to sites of a genuinely strategic nature. The Local Plan defines this as sites of 30+ dwellings or of importance to meeting overall Local Plan or NPPF targets (Glossary, p262). It is noted that Policy H2’s highest band for affordable housing starts at 30+ dwellings from greenfield sites.  |
| Pegasus Group for JJ Gallagher Ltd | PM10 | Support zero rate of CIL for extra care homes. Concern that it is proposed to seek CIL on other forms of sheltered persons' accommodation. Need to clarify the precise definition of extra care verse supported housing etc. Considers that the sales values in the Burrows Hutchinson report are too high. Should refer to retirement schemes rather than retirement housing. Support exceptional circumstances policy.  | Support for exclusion of extra care units and the provision of exceptional circumstances relief is noted. The Torbay Viability Update (Burrows Hutchinson Ltd) specifically advised that sheltered accommodation is likely to be viable with CIL. It found that retirement units in Paignton and Torquay achieved equal or higher value per sq m than general needs housing (see Table 1) and that retirement living/villages had a buffer of £187 per sq m available for CIL. On this basis there is a significant margin for error (taking into account the figures argued by Pegasus, which would still allow CIL to be levied on sheltered housing and it to remain viable. It is noted that Exceptional Circumstances relief is offered if specific developments are not viable. The Council has no objection to specifying the definition of extra care housing. Whilst the Use Classes order is imprecise, it may be more practical to define Extra Care units as falling into Use Class C2. (Whereas sheltered and supported units are likely to fall within Class C3). Note that Pegasus’ objection relates to a proposed site at Sladnor Park, Maidencombe, which is likely to fall within the lower end of what the Council would consider strategic (Q.V. comments by Stride Treglown).  |
| Cavanna Homes  | PM11 | Object to the reduction in time for instalments. The viability impact of this has not been tested. Will have a negative impact on development cash flow as 180 days is not sufficient to complete significant schemes.  | Issues noted. The Council is able to amend its instalments period outside of the examination process under s69B of the CIL regulations. The Council would not object to allowing longer installments, subject to a maximum repayment time of 24 months should the Examiner consider this justified. Whilst the Council do not wish to amend the instalments policy at this stage, it is willing to accept the Examiner’s recommendation should he consider it to be appropriate.  |
| WYG on behalf of Sainsbury’s Supermarkets Ltd.  | PM12 | No fresh comments, but rely on previous objection made at Revised Draft Charging Schedule stage (i.e. object to treating Willows as an out of centre location.  | The Willows was found by the Torbay Retail Update (2013) to operate as an out of town shopping centre with regard to viability, and it is therefore considered appropriate to treat it as out of centre for purposes of CIL viability.  |
| **Individuals**  |
| None |  |  |  |