**Torbay Community Infrastructure Levy Examination Hearing, 9th November 2016**

**Oral Evidence by Torbay Council**

The attached sets out the oral evidence that the Council intends to present at the Hearing on 9th November in respect to the issues identified by the Examiner’s Note.

Clearly other matters may arise at the hearing that require a Council response.

The Council will also be represented by Andrew Burrows MA, FRICS on viability matters. It has not been possible to commission Peter Brett Associates to attend the Hearing.

The Council’s current position is set out in consultation statements dated September 2016 and October 2016. I have tried to keep repetition of evidence cited in these documents to a minimum.

**Issues raised by the Examiner**

1. **Outline by the Council of the Proposed Levy and steps taken to meet the legislative requirements.**

**Procedural Matters**

In preparing the CIL, the Council has followed the legislative requirements set out in the Community Infrastructure Levy Regulations, 2010 (as amended) and the Planning Act 2008.

Consultations took place on:

* Preliminary Draft Charging Schedule between 9th December 2011- 6th February 2012
* Draft Charging Schedule between 9th February 2015- 23rd March 2015
* Revised Draft Charging Schedule between 18th March-29th April 2016.
* Proposed Modifications to the submitted Draft Charging Schedule between 5th September 17th October 2016

Representation on these consultations have been considered and a response published on the Council’s website, in accordance with the requirements of Regs15-19 of the CIL Regulations.

The Council’s proposed CIL has undergone a number of iterations over these consultations. The hiatus between 2012 and 2015 was due to the need to adopt the Local Plan before progressing CIL.

The current proposals, entitled “Submission Draft Charging Schedule Incorporating Revised Proposed Modifications”, dated September 2016 were approved for Submission for Examination by Council on 11th May 2016. They were submitted for Independent Examination on 11th August 2016 (with the above noted Proposed Modifications being consulted on in September –October)

**The Broad Approach to CIL**

The Council’s proposed approach is **broadly** to seek CIL from most small and urban developments, which will obviate the need for s106 obligations in most instances.

The Council has proposed Residential Charging Zones based on likely viability:

* Built up areas based on top 20% deprivation
* Elsewhere in the built up area
* Outside the built up area
* Future Growth areas

Within these Zones differential rates between zero and £140 per sq m are proposed on sites of 1-3 dwellings, 4-14 dwellings and 15+ dwellings.

For large developments in Future Growth Areas it is proposed to seek infrastructure through s106 Obligations. So the approach to CIL is relatively narrow.

It is considered that s106 obligations for the whole gamut of infrastructure, combined with the costs of unlocking these sites and affordable housing would render them unviable.

In taking this stance, the Council accepts that there is an opportunity cost between CIL, affordable housing and sustainable development infrastructure. It considers that a “narrow” approach to CIL on these strategic sites is the best way to ensure delivery of sustainable communities, in Accordance with Regulation 14 of the CIL Regulations.

**Relationship between CIL and S106**

The relationship between s106 and CIL has been raised in representations, and the consultation on the Draft Planning Contributions and Affordable Housing Supplementary Planning Document has recently taken place (closing date 31st October 2016). The SPD remains a draft, and officers intend to recommend that it be amended prior to adoption.

Some of the late concern from the development industry appears to have arisen from the “sustainable development” contributions in the draft SPD. (These are sometimes called “tariff style” contributions).

The Council do not intend to seek these sustainable development contributions from sites which are CIL liable.

It is proscribed under the Written Ministerial Statement of 28/11/2014 and PPG to seek them from developments of less than 11 dwellings ( 6 in the rural areas) .

For the avoidance of doubt the Council emphasise that all obligations will meet the Test of Lawfulness, and where they are for infrastructure no more than 5 obligations will be pooled.

They are not intended to be calculated on a “tariff style” basis. The SPD does attempt to calculate the impact of development, for example on education.

It is likely that applications in Future Growth Areas will be strategic in nature and it will be possible to identify the necessary infrastructure without breaching pooling limits.

**Commercial CIL.**

It is proposed to levy CIL on out of town centre retail and food and drink uses at £120 per sq m. It is proposed to treat The Willows, Torquay as out of centre based on its viability characteristics.

All other commercial uses are zero rated.

There have been no requests for the commercial CIL matters to be considered at the Hearing although written representations have been submitted about The Willows. .

1. **The Potential Funding gap**

The Council has cited the 2011 Infrastructure Delivery Study (Baker Associates/Roger Tym and Partners) figure of a total infrastructure funding shortfall of £160 million of which £52 million is considered to be critical infrastructure.    There is a typographical error on page 7 of the proposed Modifications to the Submission Draft Charging Schedule. This should read millions and not thousands (for which apologies).

The Infrastructure Delivery Study relates to the level of growth promoted in the current Adopted Local Plan, and is therefore considered to be relevant as a high level assessment.

In the context of the Council’s Capital Spending  Programme 2016/17- 2019/20 the proposed capital spending is £128 million. Of this £47.8 million has funding (e.g. from Revenue Support Grant, Education Funding Agency, Local Enterprise Partnership, Access (Department for Transport) Fund etc).  £1.2 million will be raised from the sale of Council land and assets and £79million from borrowing.

The cost of servicing this borrowing comes from the Council’s revenue budget.   The Council has not borrowed against future CIL income.

For the current year 2016/17 the Capital spending budget is £32 million of which £14 million is from borrowing.

Whilst not all of the Capital programme is spent on supporting new growth, a significant proportion of it is; and it illustrates that the identified infrastructure funding gap in the Infrastructure Delivery Study remains relevant.

The Council’s Reg123 List identifies  two items: the South Devon Highway and mitigation of impacts on the South Hams Special Area of Conservation.

PPG 25-083-20140612 indicates that CIL can be used to repay expenditure on infrastructure that has already been incurred, but not to pay interest on money raised through loans.

**The South Devon Highway** is a pivotalpiece of road infrastructure needed to support economic growth in Torbayand provides vital link to the wider region and beyond.It was proposed in the former Torbay Local Plan 1995-2011 and in the current Adopted Local Plan 2012-30 (Policy SS6 Strategic Transport Improvements).

It opened in December 2015, but has not yet been paid for.

The Council has budgeted to contribute around £20.2m towards the construction of the road.  So far it has paid £12.7m, with around £7.5m still to pay.

Of Torbay’s £20m share of the budget, approximately £18m is expected to be funded from borrowing as we have no other available resources.  However if other resources become available e.g. CIL then these contributions would reduce the amount the Council will need to borrow.

For information the total scheme was estimated to cost £116m with the Government (Dept for Transport) providing £76m, and the balance is shared 50/50 between DCC and Torbay i.e. approx £20m each.

On this basis the South Devon Highway represents an infrastructure funding gap of £18 million.

**South Hams Special Area of Conservation**It will be noted from the Council’s response to representations that productive discussion has taken place between the Council, Natural England and Torbay Coast and Countryside Trust in relation to the South Hams SAC.    Policies SS8 and NC1 of the Adopted Local Plan identify two separate development impacts upon the SAC.  These are the direct impact of development upon  biodiversity such as greater horseshoe bats, and indirect recreational impacts upon the limestone grassland at Berry Head to Sharkham Point, Brixham.

To avoid double dipping of CIL and s106 contributions, it is proposed to limit CIL to addressing the recreational impact of development upon limestone grassland.   There is an updated assessment of the cost of this, from Natural England and TCCT of £384,000.   This is unfunded.     In line with Natural England’s letter of 17 October 2016 it is proposed to revise the Regulation 123 list accordingly and to prioritise addressing impact on the grassland from CIL (averaging about £29,500 per year).   This would address the impact arising from all development not just sites that pay CIL.

It is proposed to seek s106 Obligations to address the direct impacts of development upon biodiversity, including greater horseshoe bats.   In most instances this will be achieved through on or off site planting,  provision of roosts etc.  However there will be instances where it needs to be the subject of a S106 obligation.

The Council is not recommending that CIL be widened, but if it were to be, then other items for which a funding gap exists would be added. For example Edginswell Station (£5.1 million gap out of £9million cost), Education (total cost of £40.71 million to meet growth in the Local plan).

1. **The viability implications of the proposals for strategic sites**

The approach of using s106 to fund the delivery of infrastructure in strategic urban extensions is used in other areas, including (but not limited to) Birmingham, South Somerset and Mid Devon. The Inspector’s Report for South Somerset has recently upheld this approach.

The Council’s rationale for seeking s106 rather than CIL is noted above and in the September 2016 Consultation Statement.

The Council acknowledge that its viability evidence shows that such sites would be viable with S106 Obligations, of up to £140 per sq m (table 5.2 of the PBA January 2016 report) and slightly higher according to the Burrows Hutchinson Viability Update, Appendix C.

However the cost of unlocking these sites is likely to be greater than on small sites. Evidence presented to South Somerset CIL Examination indicated that the cost of unlocking sites of 200-500 dwellings to be in the region of £20,441 (of which £14,819 are scheme abnormal and enabling and £5,622 are “scheme mitigation” s106 Obligations. This is attached at Appendix 1

These would generally fall within the category of “site acceptability” contributions or on-site mitigation conditions under the Council’s existing and Draft Planning Contributions an Affordable Housing SPD.

Seeking CIL in addition to these matters would preclude seeking “sustainable development obligations” such as education, sustainable transport, green space etc being sought, which will inevitably make it more difficult to achieve sustainable development in these areas.

The Council reiterates that all s106 Obligations will meet the CIL Regulations 122 and 123 tests of lawfulness.

It is noted that the development industry has challenged the viability assumptions in the Council’s evidence. Detailed discussion on these will need to be addressed by Andrew Burrows.

**State Aid**

The Council do not consider that its approach will violate State Aid, since it will be seeking s106 Obligations in lieu of CIL where the Tests of Lawfulness are met.

State Aid exists when/if an advantage is granted by the LPA through public resources (e.g. exemption from paying CIL) which would favour certain undertakings (e.g. developers in Future Growth Areas) which could distort competition, or affect trade between EU member states.

Although the LPA has set differential rates for development in different areas of the Borough, these rates are based on evidence-based assessments which demonstrate that viability varies by area.  For example, although build costs will be the same or similar, property values are lower in “Inner Urban” areas (those with high levels of deprivation), and Future Growth Areas will have higher infrastructure costs (new highways, drainage systems and contributions toward the provision of new schools) and will also attract a requirement to provide a higher level (30%) of Affordable Housing.

For this reason, the LPA considers that the CIL Charging Schedule:-

1. Does not grant an advantage to developers of schemes of 15 or more dwellings in Future Growth Areas because those developers will be liable to a different form of contribution towards infrastructure (through s.106 contributions).  As a result, State Aid has not been granted through the CIL Charging Schedule when considered in conjunction with the Planning Obligations and Affordable Housing SPD. Additionally, as it is expected that a similar percentage of GDV is likely to be expended on infrastructure/affordable housing through the SPD route, there will be no distortion in competition.
2. Schemes of 1-3 dwellings in Inner Urban areas may fit the strict definition of State Aid. However there is clear evidence in the viability studies that they are unlikely to be viable with CIL. Moreover, since such developments are small they will by their nature fall within the de minimis block exemption (200,000 euros over a rolling 3 year fiscal period per individual recipient).

State aid considerations have not prevented the adoption of zero rates of CIL in other Strategic Urban Extensions elsewhere, on the basis that s106 Obligations and opening up costs would render developments not viable with CIL.

**Town Centre Regeneration**

For the above reasons, the Council do not consider that the CIL rates will discourage urban regeneration. The attached statement by Pat Steward, the Regeneration Programme Director at the Torbay Development Agency sets out more details on urban regeneration programmes. (See Appendix 3)

**4). The viability of the proposed Levy on small residential sites within the built up area**

In response to representations on the RDCS and Andrew Burrows’ Viability Update the CIL Charging Zones have been revised and published as larger scale maps (which are easier to view electronically).

These take the Indices of Deprivation 2015 as a starting point but have been assessed in detail to iron out anomalies in small areas, so that the zones reflect property values as closely as practicable.

There appears to be no dispute that sites of 1-3 dwellings in Zone 1 (lower value) areas are unlikely to be viable with CIL.

It is recognised that there is an issue with sites of 1-3 dwellings in Zone 2 (elsewhere in the built up areas).

The Council’s evidence on sites of 1-3 dwellings is set out on pages 7-9 of the September 2016 Consultation Statement. In summary, it is considered by Members that developments of 1-3 dwellings in Zone 2 are likely to be viable with CIL on the basis that s106 obligations had been raised between 2012-15.

To supplement the evidence in this Statement, s106 Obligations agreed between April 2015 to October 2016 indicate an average per unit of:

* 1-3 dwellings £3,320
* 4-14 dwellings £3,040
* 15+ dwellings £2,500

The lower figure for large sites is likely to reflect higher on-site requirements including affordable housing.

**The proposed levy for retirement housing**

As set out in the October 2016 Consultation Statement, the Council has zero rated extra care units for CIL purposes.

The Viability Update specifically examined retirement villages and found that a buffer of £187 per sq m was available for CIL.

Further advice on viability will be provided at the hearing by Andrew Burrows.

**The assumptions and evidence used in the viability studies.**

The Council has commissioned extensive viability testing including:

* Roger Tym and Partners/ Peter Brett Associates 2012 (as part of the Infrastructure Delivery Study).
* Peter Brett Associates 2014, as part of Whole Plan Viability Testing
* Peter Brett Associates 2016
* CIL Viability Update, Burrows-Hutchinson, August 2016

For the avoidance of doubt, the Council has confidence in PBA’s findings. However in the light of comments made on the Revised Draft Charging Schedule, (not least by PCL Planning), the Council considered that it was appropriate to appoint Burrows Hutchinson LTD to provide a review and update to PBA’s findings.

Detailed viability matters will need to be answered by Andrew Burrows, who will be attending the Examination.

It is noted that PCL Planning made no representations themselves to the Proposed Modifications to CIL, but submitted a detailed critique of viability evidence, received on 3rd November 2016. The council has been unable at this late juncture to obtain further evidence or advice from Peter Brett Associates.

**Any other matters**

The Council remains of the view that its approach to CIL makes an appropriate balance between achieving funding through CIL and the potential effects of CIL upon economic viability of development across its area.

In setting its CIL and s106 approach it has striven to ensure that viability concerns do not undermine the delivery of development, through offering instalments and discretionary exceptional circumstances exemptions.

It considers that s106 Obligations are likely to be a more effective tool for achieving sustainable development on strategic sites. The October 2016 Consultation statement indicated that there may be some merit in extending this to all strategic sites, although the definition in the Local Plan of 30 dwellings constituting a strategic site may be too low for CIL purposes. The Council would suggest that 50 dwellings may be more appropriate.

The Council is not recommending a CIL only approach. But if this were recommended by the Examiner, then the Reg 123 List will need to be expanded, and the “sustainable development” obligations currently part of the Planning Contributions and Affordable Housing SPD contracted accordingly.

David Pickhaver

Senior Policy and Project Officer

Spatial Planning, Torbay Council.

8th November 2016.

Appendix 1 S106 Obligations agreed 2016-17

Appendix 2 Savills evidence on the opening up cost fro strategic sites, presented to South Somerset DC CIL Examination

Appendix 3 Town centre Regeneration Statement by Pat Steward, Regeneration Programme Director, TDA