

Central Bedfordshire Council

Re: Adoption of Charging Schedule for Community Infrastructure Levy

NOTE

1. I am asked to advise Central Bedfordshire Council ('the Council'), regarding its intention to progress towards adoption of a charging schedule ('the Charging Schedule') in respect of the Community Infrastructure Levy ('CIL'), for the purposes of the Community Infrastructure Regulations 2010, as amended ('the 2010 Regulations').

Preliminary

2. My advice is sought urgently in respect of this matter, and accordingly I provide advice by way of a concise 'Note', rather than by way of a more comprehensive 'Opinion'. By way of general context however, I note that from 6 April 2015 ('the Start Date') Regulation 123 of the 2010 Regulations has engaged to preclude a local authority from collecting by way of a planning obligation¹, financial contributions in respect of an infrastructure project/type of infrastructure where 5 or more such contributions have previously been required (by means of planning obligations) by that authority in respect of the particular project or infrastructure type.
3. Given this context, there is obviously a pressing need for the Council to adopt the Charging Schedule as soon as possible; the continuing absence of a Schedule now that the Start Date has passed will inevitably restrict the ability of the Council to gather financial contributions from development in order to fund infrastructure within the borough. Continuing reliance on the former procedure, whereby such contributions were collected by means of planning obligations

¹ The term planning obligation refers to an obligation concluded pursuant to section 106 of the Town and Country Planning Act 1990.

pursuant to section 106 of the Town and Country Planning Act, will potentially be highly problematic².

Development Strategy

4. However, the desire of the Council to adopt a Schedule for the purposes of CIL is complicated by the difficulties that it is currently having regarding the adoption of its new development plan, the Development Strategy for Central Bedfordshire ('the Strategy').
5. In this regard, I note that a draft of the Strategy ('the Submission Draft') was submitted to the Secretary of State on 24 October 2014. Thereafter, an Inspector initiated an Examination in Public in respect of the Strategy in early 2015, with initial hearings beginning on 3rd February 2015. The matters considered by the Inspector at these initial hearings included the question of whether the Council had discharged the statutory 'Duty to Cooperate' imposed by section 33A of the Planning and Compulsory Purchase Act 2004 (as amended by the Localism Act 2011).
6. Unfortunately, by way of a letter dated 16 February 2015, the Inspector indicated it was his view that the Council had failed to discharge the Duty to Cooperate. Such finding on the part of the Inspector precluded the adoption of the Strategy, and accordingly the Examination in respect of the Strategy has not continued.
7. The Council initiated judicial review proceedings in respect of the Inspector's conclusion on 12 March 2015. However, permission to bring judicial review has – to date – been refused; most recently Patterson J refused permission at an oral hearing on 16 June 2015. Thus, whilst I understand that the Council intends to appeal the decision to the Court of Appeal, at present the decision of the Inspector remains intact.
8. In light of all these circumstances, it appears unlikely that the Council will be able to progress the adoption of the Strategy in its current form – and certainly not in the short term³. Indeed, if the judicial review challenge to the Inspector's conclusion is ultimately unsuccessful, I anticipate

² As regards the difficulties/risks inherent in seeking to rely on planning obligations to gather financial contributions in respect of infrastructure, I have previously advised Instructing Solicitor in conference.

³ I would not expect that any appeal to the Court of Appeal as regards the application for permission to bring judicial review, would be dealt with before the Autumn at the earliest.

that there will be some very considerable delay whilst the Council seeks to remedy the perceived failure in terms of its efforts to discharge the duty imposed by section 33A of the 2004 Act. Thereafter the Council would, once again, need to submit a draft of the Strategy to the Secretary of State, following which a further Examination in Public would need to be held. Thus, even on the most optimistic view, there is no likelihood of the Council being able to adopt the Strategy until later in 2016.

CIL Schedule

9. For the purposes of this Note, the significance in the delay to the future adoption of the Strategy lies in the relationship which would otherwise ordinarily exist between a CIL charging schedule and the development plan for a particular district/borough.

10. Significantly in this regard, my attention is directed to a letter dated 5 June 2015, in which the Inspector in relation to the Maldon District Council Plan, Mr David Vickery, declined to proceed with the Examination in respect of that development plan. In notifying Maldon District Council that he was not prepared to continue with the Examination due to his negative interim findings in respect of the plan, the Inspector observed:

“It is the Inspectorate’s usual practice when a Local Plan and CIL are submitted simultaneously for the Local Plan examination to be held first and the CIL examination to follow at a later date. It is not possible or practical for the necessary viability testing of your Council’s evidence supporting the proposed CIL rates to be carried out until such time as I am satisfied that your Plan can be taken forward and put in place, which presently appears unlikely. This is because I must consider whether the rates put forward would put at risk the delivery of the scale and general locations of development proposed in the Plan, bearing in mind the necessary associated infrastructure”.

11. The nexus which the Maldon Inspector identifies between a CIL schedule and a development plan, is grounded in the need for a schedule to be based on ‘evidence’. In this regard, and by way of illustration, I note that section 211(7A) of the Planning Act 2008 states:

*“A charging authority must use appropriate available **evidence** to inform the charging authority’s preparation of a charging schedule”* (emphasis added).

Further in this regard, I note that the 2010 Regulations refer to the rates for CIL being set with reference to *“relevant evidence”*, such evidence being defined in the following terms:

“relevant evidence’ means evidence which is readily available and which, in the opinion of the charging authority, has informed its preparation of the draft charging schedule”.

12. Whilst there is no statutory requirement for the ‘evidence’ on which a CIL schedule is based to include a recently adopted development plan, the close inter-relationship between schedules and plans is emphasised in government guidance. In this regard, the NPPG provides⁴:

“Charging schedules should be consistent with, and support the implementation of, up-to-date relevant Plans”,

and

“Charging schedules are not formally part of the relevant Plan, but charging schedules and relevant Plans should inform and generally be consistent with each other. The National Planning Policy Framework in England (paragraph 175) provides that, where practical, charging schedules should be worked up and tested alongside the Local Plan”.

13. It is in this context, and in particular having regard to the views expressed by the Inspector considering the Maldon District Council Local Plan, that the Council has sought my advice. Officers are understandably concerned that attempts to progress the adoption of the Charging Schedule will be in vain, having regard to the Council’s failure to adopt the Strategy; thus I am asked to consider whether it is worthwhile the Council launching its consultation on the Charging Schedule, (which consultation is due to commence on 29 June 2015).

Proposed Way Forward

14. It is my firm view that the Council should commence its consultation exercise and seek to progress the CIL Schedule, notwithstanding the difficulties it is currently experiencing as regards its efforts to adopt the Strategy.

⁴ See paragraphs 010 and 011, ID: 25-010-20140612.

15. In so advising, I note firstly that there is no statutory requirement that either:
- a) A charging schedule and a development plan to be adopted ‘simultaneously’; or that
 - b) A recently adopted development plan comprise part of the evidential basis which informs a charging schedule.
16. Secondly, I note that the Planning Advisory Service (‘PAS’) has recently published an Advice Note confirming its understanding is to the effect that there is no rule prohibiting the adoption of a charging schedule “*in advance of adopted, up to date local plan*”. Indeed, the view which the PAS advance is that “*...you don’t have to have an up to date plan*”, albeit that “*you do need up to date, relevant evidence*”.
17. The PAS assert that such position is consistent with that expressed to them by a senior PINS inspector, and by personnel responsible for CIL at the Department for Communities and Local Government.
18. Thirdly, I note that in the case of the Examination into the Sheffield City Council draft charging schedule, the Inspector did not regard the absence of an up to date development plan as a bar to adoption of a charging schedule. In this regard, the Inspector observed⁵:

“The Sheffield Development Framework Core Strategy was adopted in 2009 to cover the period until 2026 but is expected to be replaced at an earlier date....

The Core Strategy lacks detail of specific infrastructure requirements. However in September 2013 the Council concluded consultation on a pre-submission draft of the City Policies and Sites Development Plan Document. That included a draft Policy A1. That policy has not been adopted, but it is a material consideration in the determination of infrastructure priorities pending the anticipated replacement of the Core Strategy by a new Local Plan. A Review of the Charging Schedule would be necessary as and when a replacement Local Plan is proposed in order to support its revised strategy and infrastructure needs. It is not anticipated by the Council that the Local Plan will be adopted before 2018”.

⁵ See paragraphs 4 and 5 of the Inspector’s Report.

19. Fourthly, I observe that the Inspector's observations in respect of the Maldon schedule, specifically referred to the fact that the plan and charging schedule had been submitted for examination "*simultaneously*". Such 'simultaneous' submission of plan and charging schedule is, in my view, a distinction from the position in Central Bedfordshire; here the two documents were *not* submitted 'in tandem'⁶. Given that the documents have been progressed independently (albeit, presumably, with the one informing the other), and given also that it is likely that there will be substantial delay before the Strategy is adopted, I consider that the Council is well-placed to argue that its position is more akin to that considered by the Inspector in Sheffield, than that in Maldon.
20. For all these reasons, notwithstanding there are certainly risks associated with progressing the Charging Schedule towards Examination, I consider that the Council can and should proceed⁷.

Concluding Remarks

21. The final observation I should make in this context however, is one that is grounded in the advice which I have previously given in conference. Given that the Start Date has passed, the Council's scope to gather financial contributions in respect of infrastructure by means of planning obligations, is now severely restricted. In these circumstances my own view is, effectively, that the Council should 'take the risk' of progressing the Charging Schedule, notwithstanding that the circumstances for doing so (ie where the Strategy is not/has not progressed to adoption) are far from ideal. This is because I consider that the Council would be advised to take all measures open to it, in order to keep the 'window' between the Start Date and the date on which the Charging Schedule is adopted, as short as possible.

⁶ The PAS Advice Note specifically identifies the simultaneous submission of documents as a problem in this regard, stating: "*In some cases, **where local plan and CIL charging schedules have been submitted together, the CIL Examination is being held back until the local plan examination has happened...**The authorities that have had their CIL held up include: Mid Sussex, Runnymede, Solihull and **Maldon***" (emphasis added).

⁷ In expressing this view, I should state that I have only had regard to the consideration the subject of my instructions – namely the failure of the Council to adopt the Strategy. It goes without saying that in order to be successful in taking the Charging Schedule to Examination, the Council will need to be able to demonstrate that the rates identified within it are grounded in up to date, robust evidence. I have not seen, nor been asked to consider, either the Charging Schedule or the evidence on which it is based.

I trust this Note addresses the issue raised in my instructions. In the event Instructing Solicitor wish to discuss the matter further, she should not hesitate to contact me in Chambers.

Alexander Booth

25 June 2015

Chambers of Andrew Tait QC

Francis Taylor Building