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Forward Planning
Mid Devon District Council
Phoenix House
Phoenix Lane
Tiverton

Our ref:

5 December 2011

Dear Sir

Preliminary Draft CIL Charging Schedule

This representation is made on behalf of Sainsbury's Supermarkets Ltd.

Summary

1 Sainsbury's object to the proposed CIL charge on "large" retail development. The proposed differential charge is not permitted by the CIL Regulations, is not justified by the evidence and conflicts with the Council's legal obligation not to grant state aid.

2 Sainsbury's is also concerned that the proposed level of CIL on retail uses is excessive and will make retail development unviable. The proposed level of CIL is high because retail development is expected to bear a disproportionate share of the infrastructure cost compared to the need for infrastructure that is needed to support retail development. The approach is inequitable.

Law and Guidance

3 Where a charging authority seeks to apply differential rates in different areas or by reference to different intended uses of development they must satisfy themselves, with evidence, that this does not give rise to state aid issues. Paragraph 40 of the CLG CIL Guidance is clear about this. We have not seen any evidence that this issue has been considered. Before the final draft charging schedule is prepared the state aid issue will need to be addressed.

4 Regulation 13(1) only allows a charging authority to set differential rates on two bases: first by reference to the intended zones in which development would be situated and secondly by reference to different intended uses of development. No other bases for differentiation are permitted.

5 The CIL Guidance, to which a charging authority "must have regard" notes that "*differences in [CIL] rates need to be justified by reference to the economic viability of development*" (paragraph 34). Paragraph 36 notes that differential charges for different uses of

development can only be justified by a comparative assessment of the economic viability of those categories of development.

6 As a matter of law CIL can only be charged at different levels for "*different intended uses of development*". There is no difference in the "intended use of development" between a large and a small retail scheme. Both are retail uses. Both fall within the same use class. There is no need for permission for a change of use (in the absence of a condition) to sub-divide a large retail unit into smaller units, or to amalgamate retail units within a larger building.

7 It is not within the Council's legal powers to promote different CIL levels for intended uses of development by reference to the proposed floorspace of that development.

8 Even if we were wrong about this (which we are not) the Council would have to have very clear viability evidence to justify the differentiation in state aid terms. There is nothing in the supporting evidence to suggest that the Council have even considered whether there is sufficient objective justification for the proposed differentiation to satisfy state aid requirements. As the Guidance notes the "*burden*" is on the charging authority to demonstrate this. That burden has not been discharged.

Justification for Differentiation

9 In any event the CLG CIL Guidance requires a charging authority to show that there is a viability justification for differentiating between different intended uses of development. As you will be aware the Examiner into the Newark & Sherwood CIL found that the proposed differentiation between sizes of retail development had not been adequately justified. The charging authority was required to amend their Charging Schedule to charge the same amount to all retail uses. (Note that the legal impediments to differentiation between sizes of development were not addressed at the Newark & Sherwood examination).

10 There is nothing in the supporting evidence that provides an adequate justification for the proposed differentiation. The only evidence supporting the CIL Charging Schedule is the Roger Tym analysis. It is difficult to follow the full logic of the Roger Tym approach but they propose charging all retail development over 500 sq m at £250 sq m.

11 The Roger Tym analysis suggests that town centre development is not viable. Unfortunately the proposed CIL charging schedule would apply a £250 sq m rate to town centre development above 500 sq m in size, apparently rendering it unviable. Roger Tym similarly suggest that retail warehouse development realises a net value of £162 sq m. The proposed charging schedule would seek to charge CIL at a rate of £250 sq m for a retail warehouse development, again rendering such development unviable.

12 Roger Tym do an analysis that suggests that supermarkets would be viable but nothing in their analysis suggests that the viability of a supermarket depends on size. Yet they use the supermarket viability analysis to justify a 500 sq m threshold for charging CIL.

13 Taken together this is an inadequate basis for differentiating between small and large retail uses. It is not adequate to meet the requirements of the Guidance. As noted above it is wholly inadequate to meet the need for a justification for state aid purposes.

General Issues

14 The proposed CIL rate for retail premise is higher than the majority of CIL rates for retail development that are being proposed around the country. In part this is because the level of infrastructure funding gap (mainly related to the need to provide infrastructure for housing development) is high. In part it is because the burden of CIL is pushed firmly towards retail development.

15 This approach is inequitable. Rather than the charge being used, as regulation 14 suggests, to raise money to provide infrastructure to support development the charging authority seems to want to use CIL as a tax on success. This is not an appropriate way in which to allocate CIL.

Conclusion

16 The proposed differential charging for small and large retail uses is outside the scope of Regulation 13. The approach cannot properly be pursued. Even if differentiation were possible there is no adequate justification for the approach adopted.

17 The charging authority should adopt a single figure for CIL for retail development. Since the evidence is that small scale retail development will not be viable with a significant level of CIL it follows that the figure should nil.

Yours sincerely

SNR Denton UK LLP