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**Sandra Hutchings**

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**From:** Nicola Gooch  
**Sent:** 25 June 2014 16:49  
**To:** DPD  
**Cc:** Bob Parkes  
**Subject:** Preliminary Draft Charging Schedule Consultation closing 11 July 2014 [IWOV-GATWICK.FID253323]  
**Attachments:** 2899\_001.pdf

Dear Sirs

Please find attached a scanned copy of my firm's representations to the above consultation, made on behalf of Asda Stores Ltd.

If you would like a work version of the attached, please let me know.

Kind regards

**Nicola Gooch**  
Solicitor  
for and on behalf of Thomas Eggar LLP



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Thomas Eggar LLP  
Belmont House Station Way  
Crawley West Sussex RH10 1JA

Telephone +44 (0)1293 742 700  
Facsimile +44 (0)1293 742 999  
DX no. 85715 Crawley

Forward Planning  
Mid-Devon District Council  
Phoenix House  
Phoenix Lane  
Tiverton  
EX16 6PP



planningconsultations@middevon.gov.uk

**By Email and by Post**

Our ref: PPG/CD/KB/45119238

Your ref:

25 June 2014

Dear Sirs

**Community Infrastructure Levy Regulations 2010 (as amended)  
Preliminary Draft Charging Schedule Consultation closing 11 July 2014  
Response to Consultation on behalf of Asda Stores Limited**

We act for Asda Stores Limited ("Asda") and are writing on behalf of Asda to make representations in respect of the Council's Preliminary Draft Charging Schedule.

Given that the Council has already had a Charging Schedule approved by an Inspector at examination, and already conducted two previous CIL consultations, many of our concerns will already be familiar. As the Council has elected to restart its consultation process, however, we have set out our concerns below in full, to avoid the need to cross reference with our earlier consultation responses.

Under Regulation 14 of the Community Infrastructure Levy Regulations 2010 ("CIL Regulations") the Council's primary duty when setting the level of Community Infrastructure Levy ("CIL") charge is to strike an appropriate balance between the desirability of funding the cost of infrastructure required to support development from CIL and its potential effects on the economic viability of development.

In our view, the approach taken to assessing the Preliminary Charging Schedule does not achieve an appropriate balance between these two objectives.

We wish to object to the approach taken to assessing the Preliminary Charging Schedule on the following grounds:

1. The impact on policies enhancing economic performance;
2. the financial assumptions and viability assessments contained in the Council's Viability Study;
3. The proposal to split convenience and comparison retail;
4. Issues relating to State Aid; and
5. concerns about the Council's approach to setting CIL charges generally.

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## **1 Impact on policies enhancing economic performance**

We will not repeat the Council's strategic objectives contained in its Local Plan in full here, but in order to achieve its Vision and Overall Objectives, it will be important for the Council to set an appropriate CIL charge to encourage new development to come forward. An appropriate CIL charge will encourage new development and promote redevelopment to create employment and ensure a range of shopping choices for consumers and enhance the vitality and viability in district and local centres.

The proposed retail CIL rates would discourage larger retail developments and would not ensure that the relevant retail and employment aims of the Vision and Overall Objectives are met. This could have the effect of reducing the range, variety and choice of retail shopping and, if no redevelopment or regeneration schemes are put forward, then existing buildings are unlikely to be refurbished and re-used.

It is our view that if the retail charges set out in the Preliminary Draft Charging Schedule are adopted, there will be several consequences across the Borough that will put the Council's ability to achieve its key objectives at risk. For example:

- All other forms of development will receive a significant subsidy at the expense of retail schemes; and
- There will be a corresponding disincentive (and market distortion accordingly) to investment in this sector of the local economy.

The Government is keen to encourage the creation of additional employment across the economy and the retail sector as a whole is one of the largest employers and the largest creator of new jobs at the present time as well as being one of the most dynamic and innovative sectors within the UK economy.

### Asda example 1

ASDA has a proven track record of investing in local communities and of creating jobs within these areas. For example, of the 123 colleagues recruited for the ASDA store in Tunbridge Wells, 76 colleagues (71%) were previously unemployed.

The supporting papers do not acknowledge this trend nor do they fully assess the role of retail within the national economy. They simply assert that large scale retail is performing stronger in comparison to the other aspects of the retail sector and accordingly, it implies that large scale retail establishments have the capacity to pay potentially very large sums of CIL, whereas the Town Centre comparison and small convenience retail rates are much lower.

Any CIL schedule that imposes a substantial CIL charge on superstores or supermarkets and a very low or nil rate on all other uses could effectively undermine the retail function of local and town centres, detracting from their viability and vitality as large scale retail developers would be discouraged by the imposition of CIL.

### Asda example 2

Asda stores regularly rejuvenate and regenerate existing centres, and the surrounding areas, and draw new shoppers to them, which benefits the existing retailers, and those who open stores in Asda-anchored centres in their wake. For example in 2006, Asda opened a store in Romford, transforming a derelict brownfield site through an extension of an existing

retail mall and creating 347 jobs. This helped to propel Romford into the top 50 UK retailing cities. Indeed, due to the success of the store in attracting more footfall to that part of the town's Primary Shopping Area, the local authority redrew the town centre boundary to include the edge of centre Asda store into the heart of the Romford town centre.

## **2 The financial assumptions and viability assessments contained in the Council's Viability Study**

We also have a number of concerns about the study Dixon Searle conducted in June 2014 (the "Viability Study").

The Viability Study contains retail development assumptions that in our view are inadequate as they do not make sufficient allowance for the costs involved in obtaining planning permission for a development scheme.

By excluding the true cost of residual planning for a commercial development, the Council has underestimated the true cost of retail developments and artificially inflated the residual land values used for the financial viability models. This will, in turn, have inflated the amount of CIL proposed for these uses.

The Viability Study makes an allowance of £126,000 for site preparation and s106 costs together. For a 2500 m2 retail supermarket, this is a rather low allowance and should be re-addressed.

Although the Council will not be able to pool section 106 contributions once CIL is adopted, the types of commonly pooled contributions tend not to make up a large proportion of the contributions sought from commercial schemes – which are usually focussed on site specific highways and access works, employment and training contributions, environmental mitigation works and other, site specific, requirements. This is demonstrated by the Council's draft Regulation 123 list, which makes it clear that any site specific green infrastructure or network improvements, not listed, that are needed to mitigate the impact of the development and to make it acceptable in planning terms, may still be required to be funded through section 106 and section 278 agreements; together with any infrastructure requirements which arise because of a need generated by fewer than five development proposals.

Taking the example of a 2,500 sqm convenience supermarket used in the Viability Report, this sized store, would be expected to bear a CIL payment of £250,000 and building costs of £2,735,000 (£1,094 per sqm). In addition, it would potentially fund all of the following potential costs:

- demolition, remediation and on site highways works
- the cost of any off-site highways works required to make the development acceptable in planning terms including junction improvements, road widening schemes, new access roads, diversion orders and other highways works;
- the cost of extending the Council's CCTV or public transport network to include the scheme (including the costs of creating new bus stops, real time information and providing new bus services to serve the site);
- monitoring costs of compliance with employment/apprenticeship schemes and travel plans;
- environmental off-set contributions to mitigate the loss of habitat or greenery caused by the scheme;
- The cost of any remediation and decontamination works to be carried out by the council on the developer's behalf;
- payments for town centre improvements intended to mitigate the direct impact of

- the development on the town centre or neighbouring areas caused by the particular store; and
- the costs incurred by the Council of maintaining any site specific infrastructure required by the development.

The Viability appraisal allows a budget of £126,000 to meet all of these costs.

To put this in context:

- the section 106 Contributions incurred in relation to a c.3,000 sqm food store in Ware, Hertfordshire amounted to £871,800. These sums related to bus service contributions; development of a community centre, nursery; education contributions; various highway safety improvements; youth service contribution; residents parking schemes and open space contribution. In addition to these Contributions, green travel plan contributions, monitoring fees and architectural lighting on pedestrian routes between the store and city centre were also incurred.
- the section 106 Contributions incurred in relation to a c.6,700 sqm food store in Newhaven, East Sussex amounted to £1,345,544. These sums related to contributions for improvements to and an extension of the local bus network; economic initiatives; contributions for relocating local habitats; improvement of recreational space; recycling contributions; residential and retail travel plan auditing; transportation and town centre contributions.

With this in mind, we again, suggest that the Council has significantly underestimated the impact of CIL on the viability of such developments and request that the underlying viability evidence be revised accordingly.

### **3 The proposal to split convenience and comparison retail**

We note that the Council has re-introduced its intention to charge a differential rate based on the type of retail incurred on a site, despite its earlier contention that there was nothing in the regulations that permitted differential rates within the same use class.

It remains our view that the Council's proposal to apply differing CIL rates to 'comparison' and 'convenience' retail falls outside of the scope of the rate differentials permitted in the CIL regulations.

Clause 13(1) of the CIL Regulations states that a charging authority may set different rates for different zone in which development would be situated; and/or by reference to different intended uses of development within those zones and/or by reference to the size of those schemes.

While the CIL regulations do not expressly define 'use', they regularly adopt definitions from the planning system and other planning legislation (in particular the Town and Country Planning Act 1990 (as amended) and the Planning Act 2008). As the Use Classes Order is widely accepted to be the starting point for definitions of Use within the planning system, it is reasonable to expect that the CIL Regulations reflects those definitions.

In addition, the Council's proposal to distinguish 'comparison' and 'convenience' retail also poses practical problems for retail developers and the Council themselves in assessing the charge, as most supermarkets and superstores contain a mix of convenience and comparison floorspace. The Council's current proposals will potentially result in two different CIL rates being charged for floorspace within the same building or development. Such an approach adds undue complexity to the CIL calculations.

Even if the Council does not agree with this approach; any differential rate proposed needs to be firmly based on (and grounded in) the viability evidence provided for each proposed class of development. The current viability report prepared on the Council's behalf does not contain sufficient fine grained evidence to support either the provision of differential rates based on the type of retail proposed, nor the proposed 280 square metre size threshold (which appears to have been lifted from the Sunday Trading regulations as opposed to representing an appropriate cut off based on the viability evidence obtained by the Council). We urge the Council to produce further viability evidence, taking into account the points raised at paragraph 2 (above), to ensure their CIL proposals are properly evidenced and robust.

#### **4 State Aid**

We wish to bring it to your attention that there will be EU State Aid Issues arising out of the setting of differential rates for different types of commercial entity within the same use class. Introducing such differential rates confers a selective economic advantage on certain retailers depending on the size of the shop they operate out of, or their type of business. For example, setting the levy for comparison retail schemes at a lower rate than an equivalent convenience retail scheme provides an economic advantage to comparison retailers. Alternatively, basing rate differentials on the size of a store favours smaller retailers over their larger competitors.

As far as we are aware, the UK government has not applied for a block exemption for CIL. CIL charges do not form part of the UK's taxation system and there does not appear to be an exemption in place to cover any State Aid issues that may arise. With this in mind, we would be grateful if the Council adopted a flat levy rate for comparable sectors of the economy/use classes or, if it is not prepared to do so, providing an explanation as to why State Aid issues are not engaged by the setting of differential rates within use classes to the Inspector at the Inquiry.

#### **5 Concerns about the Council's approach to setting CIL charges generally**

The stated purpose of CIL is to raise revenue for infrastructure necessary to serve development. CIL is intended to address the imbalance of raising funds for infrastructure under the section 106 route, where larger schemes have effectively subsidised minor developments. However, CIL does not replace the section 106 revenue stream – it will simply provide additional revenue for infrastructure.

In light of this, we have some further concerns:

##### **Concerns relating to change of use and conversion projects**

The Council appears only to have taken the economics of regeneration projects into account when considering the strategic development areas as otherwise the viability assessments do not appear to have given any weight to this consideration (particularly for retail developments).

As you will be aware, Regulation 40 of the CIL Regulations only permits developers to deduct pre-existing floor space from the CIL calculation if it is 'in lawful use.' Lawful use is defined in Regulation 40 (10) and essentially requires part of a building to have been in use for a six month continuous period in the three years before the date of the planning permission permitting the development.

However, many regeneration projects on brownfield land or town centres involve demolishing, converting or redeveloping buildings that have lain vacant for some time. This

is particularly true of schemes which involve changes of use from employment land, where the fact that a unit has been vacant for a considerable time is often a key factor in the Council's decision to grant planning permission for the scheme.

The Viability Study does not acknowledge that the economics of conversion schemes are very different to those of new build schemes. It is difficult to see how the Council can assess whether the imposition of CIL will put the majority of these schemes at risk without having considered its impact on their viability.

## **ASDA's SUGGESTIONS**

### **1. Instalment Policy**

We note that the Council proposes to publish a draft instalments policy for CIL for residential development. We would encourage the Council to introduce an instalment policy for all CIL payments, including retail, as managing cash flow during development is often key in determining whether a scheme will be successfully delivered.

In setting its instalment policy, we would also ask the Council to take into account the fact that many major development projects are implemented in phases and by adopting an instalment policy this should ensure that developers are not disadvantaged by submitting an application for full, rather than outline, planning permission. We urge the Council to adopt an instalment policy which ensures that developers are not disadvantaged by the decision to submit a full planning application for a phased development scheme.

### **2. Exceptional Circumstances Relief**

It is not clear whether the Council are intending to adopt an Exceptional Circumstances Relief Policy. We would encourage the Council to adopt an Exceptional Circumstances Relief Policy, the Council will have the flexibility to allow strategic or desirable, but unprofitable, development schemes to come forward, by exempting them from the CIL charge or reducing it in certain circumstances.

### **3. Flat Rate Levy**

Accepting for the purpose of this argument the premise that CIL is necessary for the purpose of funding Borough-wide infrastructure, a much fairer solution would be to divide the Council's estimate of total infrastructure costs over the charging period (and in this connection, it is important to remember that the Government's guidance as recorded in the National Planning Policy Framework is that only deliverable infrastructure should be included) by the total expected development floor space and apply a flat rate levy across the Borough and across all forms of development. That will have the least possible adverse effect upon the market for land and for development, and yet the greatest possible opportunity for the economy to prosper and thrive and for jobs to be created.

The potential impact of a flat rate levy on the viability of those types of development which are not currently identified as viable could be balanced by the Council's implementation of Exceptional Circumstances Relief, as mentioned above.

Consequently, reducing the levy proposed per square metre on retail and residential floor space would not result in a proportionate increase in the levy required on other forms of commercial or other development. However, applying the current proposed levy could run the risk of diminishing substantially the number of such retail stores built, with a consequential loss of employment opportunities and investment.



#### **4. Provision of Infrastructure as Payment in Kind**

As stated above, the latest set of amendments to the CIL Regulations have now made it lawful for authorities CIL contributions to be paid by the provision of Infrastructure in certain circumstances. Given that the provision of infrastructure is often key to unlocking unimplemented planning permissions and enabling developments, we would urge the Council seriously to consider adopting a policy to allow payment in kind in this manner.

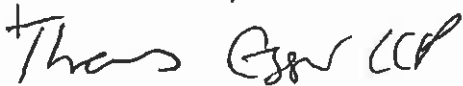
#### **CONCLUSION**

For these reasons, we would ask that the Council undertakes a rethink of its position and substantially alters its Charging Schedule in so far as it relates to retail development.

Accordingly, we would request that the Council:

- Revisits its viability assessments for retail development, to address the concerns set out above;
- Adopts a staged payments policy
- Adopt an Exceptional Circumstances Relief Policy
- Considers the allowing developers to pay their CIL Liability through the provision of infrastructure; and
- Adopts a single flat rate levy across all development within its boundaries.

Yours faithfully



**Thomas Eggar LLP**

Email: [carl.dyer@thomaseggar.com](mailto:carl.dyer@thomaseggar.com)  
Direct Dial: 01293 742888  
Direct Fax: 01293 742999

