Dear Sirs,

LONDON BOROUGH OF BARKING AND DAGENHAM
DRAFT CIL CHARGING SCHEDULE

1. INTRODUCTION

This submission is made on behalf of Barking Riverside Limited (BRL) in response to the above document. BRL control the land within the London Borough of Barking and Dagenham (LBBD), known as Barking Riverside. Planning permission was originally granted at Barking Riverside in August 2007. A further permission, pursuant to s73 of the Act was granted on 10 June 2009. (LPA ref: LGD008-175-FUL). It is this second permission that BRL has implemented (the permission). The permission was accompanied by a Dead of Variation to the 2007 s106 agreement.

The permission has been implemented and BRL continue to provide much needed new homes, together with social and community infrastructure. Accordingly, the application of a CIL charge to Barking Riverside will fall to be paid in the event that a new permission is granted and implemented at Barking Riverside (subject to of course the recent amendments in respect of permissions pursuant to s73 of the Act). This is important. It may well be the desire of BRL and LBBD for a revised scheme to be promoted at Barking Riverside at some point in time. The imposition of a CIL charge would establish a further cost liability which would mitigate against the viability of any revision, regardless of its merit in planning terms.

LBBD is consulting on its Draft Charging Schedule from 15 March to 26 April 2013, under Section 16 of the CIL Regulations. Our client is looking to LBBD to provide transparent, clear, concise and fair CILs which will enable the necessary infrastructure be delivered without compromising housing delivery in London. Our client has not previously lodged comments in respect of the Preliminary Charging Schedule. These representations are prepared in conjunction with Savills and on the basis that BRL may at some point in the future submit a new planning application in consultation with the Council.

The process for the preparation, consultation, examination and adoption of CIL Charging Schedules is set out in Part 3 of the Community Infrastructure Levy Regulations 2010 (as amended) (the Regulations). Regulation 14 sets out that in setting rates in a charging schedule, a charging authority must inter alia strike the balance between:

(a) the desirability of funding infrastructure from CIL (in whole or in part) the actual and expected estimated total costs of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and
the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area.

LBBD appointed GVA Grimley in September 2011 to undertake three pieces of work, namely:

- Preparation of a construction cost schedule;
- Preparation of a land value appraisal study; and
- Preparation of an economic viability assessment.

LBBD proposes a charge of £70 per sq/m for Barking Town Centre, £25 per sq/m for Barking Riverside and a lower charge of £10 for the rest of the borough.

In short, it is BRL’s submission that the imposition of a £25 per sq m CIL charge at BRL cannot be justified on the evidence relied upon by LBBD, nor can it be justified having regard to the viability and commercial realities of the continued development at Barking Riverside.

In considering whether the CIL charge as proposed at Barking Riverside is justified, regard ought to be had to:

- The evidence relied upon by the Council: The GVA Grimley Economic Viability Assessment – does this justify the proposed charge in the first instance;
- The robustness of the assumptions and evidence base relied upon by the Council having regard to the actual evidence of development at Barking Riverside – the BRL Assessment; and,
- Notwithstanding the above, does the proposed charging schedule provide for sufficient flexibility?

2. GVA GRIMLEY ECONOMIC VIABILITY ASSESSMENT

The proposed CIL rate has been supported by evidence produced by GVA dated January 2012. Owing to the key test of Regulation 14(1) it is important that the viability appraisal prepared is fit for purpose. It is clear that at Examination the Charging Schedule will need to be supported by “relevant evidence” (Regulation 11(1) (f)/19(1) (e)).

The Requirement for a Viability Study

The requirement to justify the Charging Schedule with evidence of viability is outlined by CIL – In Overview paragraphs 25 and 26, which notably also makes reference to setting differential rates. The CLG CIL Guidance (2012) at paragraph 23 refers to taking an “area based approach”, further of notable importance paragraph 30 outlines “charging authorities should avoid setting a charge right up to the margin of economic viability across the vast majority of sites in their area”.

NPPF paragraph 173 outlines the need for ‘competitive returns.’ The viability exercise must also be aimed to demonstrate the need for flexibility in seeking CIL payments. It should not be assumed that all development can afford to pay or that all development should be charged the same levy. It must also be recognised that in certain circumstances relief may be offered where viability is an issue.

The fundamental premise is that to enable delivery, sites must achieve a credible land value and provide developers the required return on investment, otherwise development will be stifled. This is recognised by the NPPF and is certainly ‘in-built’ within the CIL Regulations.
The principal findings outlined on page 8 of the GVA report suggest the Council should consider the adoption of a moderate CIL charge based on the assumption that in the current market affordable housing provision is likely to come forward between 0% and 10%. GVA assert that although some level of CIL is viable for some schemes in Barking Town Centre and Barking Riverside, in the current market little development in the rest of the Borough is viable, even at 0% affordable housing. BRL raise an objection with this approach. The CIL test should be against the full affordable housing policy requirement (50%), not against reduced levels. Recent Examiner’s reports for Mid Devon, (February 2013) and the Greater Norwich Development Partnership (December 2012) have set a clear precedent for CIL to be considered in the round, including the testing of policy-compliant levels of affordable housing.

Section 3 of the GVA report shows the effects of affordable housing and the tenure split within affordable housing on the ability of development to make CIL/S106 contribution in money or money equivalent, assuming a 2011 ‘current’ market and a projected 2016 ‘future’ market (page 25). Where there is an X in the box it means the residual land value has fallen below the benchmark and the scheme is therefore deemed to be ‘unviable’. Table 13 on page 27 demonstrates that in some instances (scheme 14) any payment would make the proposal unviable. Although the projections for 2016 (page 33) show most schemes can contribute at 10% affordable housing (across a range of tenures), the results are extremely marginal and if the market does not pick up as expected, the sites will be simply be unviable.

Page 51 of the GVA report explains that the majority of schemes at Barking Riverside could viably provide £50 per sq m in CIL/106 and up to 10% affordable housing in 2016. It is on this basis that ‘Recommendation 1’ states that the council initially adopt a conservative approach as to the level of any CIL charged based on the assumptions of today’s weak market conditions. However, the intention is to raise the level of CIL at a later stage. This approach is floored and rather than agreeing an uncertain level of future CIL requirement now, LBBD should be looking at what can be charged now. Instead of the proposed recommendation, BRL advises that an early review period is agreed at which point land values can be assessed accurately rather than speculatively.

3. GVA ASSUMPTIONS

Savills has set out below the areas where the GVA study does not reflect the economics of development. The most significant areas of discrepancy relate to achievable sales values/ rates, the inclusion of a viability buffer and Section 106 Costs.

Sales Values

GVA has assumed an average sales value of £2,320 per sq.m (£215 per sq.ft) however they have not provided any sales evidence to support their assumed sales values. We have obtained sales values for the first three phases at Barking Riverside and provide average sales values for unit type at each phase below:

Phase 1

Average House Sale Price: £168 per sq.ft
Average Flat Sale Price: £176 per sq.ft

Phase 2

Average House Sale Price: £166 per sq.ft
Average Flat Sale Price: £164 per sq.ft

Phase 3

Average House Sale Price: £168 per sq.ft
Average Flat Sale Price: £176 per sq.ft
This produces an average of £170 per sq.ft, £45 per sq.ft below the average sales value assumed by GVA. This will render the proposed charge of £25 per sq.ft unviable.

Sales Rate

It is not clear what sales rate assumptions GVA have assumed in their viability assessment. The sales rate assumptions will affect the cash flow of a development and therefore the residual land value and the viability of the proposed CIL rates, particularly for larger schemes such as Barking Riverside. We would request that GVA confirm their sales rate assumption for comment.

Infrastructure Costs

GVA have assumed a cost of between £30 and £54 per sq.m stated as enabling costs, it is not clear what level has been assumed in their appraisals for Barking Riverside however based on cost reports which have been previously shared with the Council the most recent cost estimate is significantly in excess of £10,000 per unit (excluding other S106 costs and works), and considerably higher than the £30 - £54 per sq.m assumed by GVA.

We would also note that ‘Viability Testing Local Plans’ produced by John Harman in June 2012 states that strategic infrastructure costs range from £17,000 to £23,000 per unit. This alone will have a significant impact on the sites tested by GVA and the viable levels of CIL

Viability Buffer

In reality, site specific circumstances will mean that the economics of the development pipeline will vary from the typical levels identified via analysis of the theoretical site typologies. This is inevitable given the varied nature of housing land supply and costs associated with bringing forward development. Therefore, there must be a viability buffer incorporated either into the benchmark land value or elsewhere through the CIL assessment process which would ensure delivery of sufficient housing to meet strategic requirements.

We are aware that many other local authorities are proposing to set CIL rates at a level that allows a viability cushion of between 30% and 60% of the theoretically viable level, to allow for site variation around the average.

Although GVA state that ‘the Council should consider the adoption of a moderate CIL charge the £25 does not appear to include a viability buffer. We would also note that the summary table on Page 8 recommends £25 per sq.m is affordable at zero and 10% affordable however from the results on page 27 CIL is only affordable on one of the tested sites.

Section 106

There does not appear to be an allowance in GVA’s Viability Assessment for Section 106 costs that are not covered by CIL. We would suggest a notional allowance of £1,000 per unit to address any Section 278 and residual Section 106 costs. The actual amounts of Section 106 will vary depending on the extent of mitigation required and this level is certainly not representative of the costs of the extensive and detailed S106 agreement in place for the Barking Riverside development. However this has been widely adopted by other authorities, including Poole and Bristol councils whose charging schedules have been examined.

Ensuring flexibility

Exceptional Circumstances: The CIL Regulations recognise the need for flexibility and provide for social housing and charitable relief. In addition there is provision for a charging authority to introduce further discretionary relief for exceptional circumstances (Regulation 55). A charging authority may only grant relief if:
• A charging authority has made relief for exceptional circumstances in its area; and

• A S106 Agreement has been entered into and the charging authority considers that:
  - the cost of complying with the S106 is greater than the CIL;
  - the requirement to pay CIL would have an unacceptable impact on economic viability;
  - the grant relief would not constitute a State aid which is required to be notified to and approved by the European Commission.

In the first instance therefore, the charging authority has the option to make provision for relief for exceptional circumstances.

Paragraph 6.1 of the LBBD Draft Charging Schedule states that 'LBBD will make relief available for exceptional circumstances in its area. The power to do this will be activated following adoption of the Charging Schedule. The regulations on this matter make it clear that relief should only be granted in truly exceptional circumstances. The fact that a development might be unviable at the time a planning application is considered is unlikely to constitute an 'exceptional circumstance' in relation to CIL Regulations'.

Based on the sales values achieved at Barking Riverside to date compared with the sales values assumed in GVA’s viability assessment, as well as the other items highlighted in Section 2, we do not believe that the proposed CIL rate for Barking Riverside is viable.

4. EFFECTIVE OPERATION OF CIL

CIL Regulation 122 – Double Counting

With regard to the relationship with the extant Section 106, the CIL Charging Schedule should be clear that ‘double counting’ of Section 106 contributions and CIL is not permitted by law. The key tests of CIL Regulation 122 should therefore be outlined within the supporting documentation. BRL is concerned at the inevitability for ‘double counting’ owing to the fact that a Section 106 agreement has already been entered into. If BRL and LBBD decide to pursue a revised scheme at Barking Riverside and a new permission is granted and implemented this would be liable to CIL. BRL would then effectively be paying double for those infrastructure items which have already been funded through Section 106 contributions.

Payments in kind

Regulation 73(1) permits the payment of land in lieu of CIL. This is an interesting tool which could be proactively interpreted where the land in question is provided for infrastructure, for example for transport provision or open space. This is particularly relevant at Barking Riverside which will deliver land for schools, open space and public transport.

It would not be appropriate for these facilities to be provided to only effectively then ‘pay double’ through the imposition of additional CIL charges. This would potentially be contrary to both Regulations 122/ 123. An effective ‘land in lieu of CIL’ mechanism is essential, otherwise larger strategic development would incur disproportionate and unjustified infrastructure costs. The mechanism of payments in kind must result in credible land values being agreed and offset against the levels of potential CIL receipts incurred through the chargeable development. If operated effectively the mechanism could considerably assist with development delivery.
Payment of CIL – Instalments

With regard to the payment of CIL, the Regulations (69B(1)) and CIL – An Overview (paragraphs 45 - 48) are clear that the charging authority has the flexibility to request the timing of the charge and hence to outline the payment procedure. However, the choice to impose an ‘instalments policy’ is entirely discretionary. BRL considers that it is imperative that such a policy is outlined at the earliest opportunity. This should cover:

- The commencement of the instalments policy on adoption of CIL
- The number of instalments that can be made by development size (£ amount and square meter amount)
- The timing of payments post commencement – based on a consideration for build out rates (i.e. longer time periods)
- The minimum development threshold which instalments would not apply (Savills suggests that this be set as low as possible)

We note that you propose to adopt the mayoral instalment policy however developers only have access to certain levels of funding throughout the construction process and this is often dependent on sale volumes, market conditions and lending criteria. The benefit of the Section 106 system (as was), was the ability to negotiate phasing of payments and if necessary renegotiate via a deed of variation. The imposition of CIL effectively removes this flexibility.

The timing of CIL payments is therefore of critical importance, particularly as the definition of chargeable development (Regulation 9) makes it clear that in instances of full planning approval the chargeable development is that entirely consented. Whilst Regulation 9(4) effectively permits a staged payment approach to outline consents (where phasing is proposed), it is normally the practice to only pursue outline (or hybrid) applications for the largest and most complex sites. The majority of planning proposals will still be submitted in full.

It will be larger schemes which generate the greatest CIL payments and as such phasing of payments should be tailored to recognise funding constraints and cash flow of such schemes. The short timescale approach would only be suitable for very small developments in which there was certainty that development would be built very quickly and the funding would be available to pay the CIL charge. Large scale development normally requires significant upfront infrastructure costs to ‘unlock’ development and the additional early burden of CIL as per the existing payment formula would therefore be very prohibitive.

It is therefore advised that any phasing of CIL payments should accord with the longer build rates expected and on this basis longer timescales for the payment of CIL should be proposed. Larger applications are in any case required to submit phasing plans with planning applications showing build rate and approximate timescales, and as such this will give the LBBD a level of certainty on when CIL payments can be expected without tying developers to timescales which are too immediate.

It may also be appropriate to define a threshold for much larger sites which a bespoke payment method for CIL will be agreed in writing with LBBD through the application process.

REVIEWING CIL

There are no details of when LBBD is intending to review its charging schedule and under what circumstances LBBD may reduce or increase its charge. Details of this should be provided along with details of how the CIL will be monitored, particularly as a proportion of the CIL will go towards the Collecting Authority’s administrative costs.
5. CONCLUSION

In summary, it is BRL's submission that the imposition of a £25 per sq m CIL charge at BRL cannot be justified on the evidence relied upon by LBBD nor can it be justified having regard to the viability and commercial realities of the continued development at Barking Riverside.

BRL welcome the existing relief provided for the regeneration area and the introduction of a differential rate. However, it is BRL's case that even at the reduced rate it is not viable and 'Barking Riverside' should be wholly excluded from the charging schedule, based on the sales values achieved at Barking Riverside to date compared with the sales values assumed in GVA's viability assessment, as well as the other items highlighted in Section 2.

BRL considers that it is imperative that an instalments policy is outlined at the earliest opportunity. Developers only have access to certain levels of funding throughout the construction process and the timing of CIL payments is therefore of critical importance. It is advised that any phasing of CIL payments should accord with appreciation for build out rates, in considering the time based payments.

We look forward to confirmation of receipt of the above and that it has been registered as duly made. We would also welcome a meeting with LBBD to discussion our position further.

Yours faithfully

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Associate