

## **COMMUNITY INFRASTRUCTURE LEVY – CHARGING SCHEDULE**

<u>Report of the:</u>	Head of Place Development
<u>Contact:</u>	Mark Berry/Simon Young
<u>Annexes/Appendices</u> (attached):	<b>Annexe 1</b> - Published Charging Schedule <b>Annexe 2</b> - Charging Schedule as approved
<u>Other available papers</u> (not attached):	None stated

### **REPORT SUMMARY**

This report highlights an issue in relation to the Council's Community Infrastructure Levy Charging Schedule, seeks Council's retrospective endorsement of the Charging Schedule attached at Annexe 1, agrees repayment of an overpayment of Community Infrastructure Levy, and notes the proposed review.

### **RECOMMENDATION (S)**

**That Council:**

- (1) endorses the Charging Schedule set out in Annexe 1 which was issued and published by the Council**
- (2) Agrees that £79,660.62 be repaid forthwith to Edificio Headley Limited in respect of the CIL charged in connection with planning permission reference 14/00606/FUL**
- (3) Notes the proposed review of the Charging Schedule, and requests the Licensing & Planning Policy Committee to initiate the review at the earliest opportunity.**

*Notes*

## **1 Implications for the Council's Key Priorities, Service Plans and Sustainable Community Strategy**

- 1.1 The Local Plan is intended to provide the spatial planning mechanism for the vision set out in the Sustainable Community Strategy, and it will assist in the achievement of all the Council's Key Priorities. The Community Infrastructure Levy (CIL) is the mechanism that will ensure that future developments contribute towards the community infrastructure that is needed to support growth.

## 2 Background

- 2.1 In September 2013, the Council began the formal processes of implementing the Community Infrastructure Levy in Epsom & Ewell.
- 2.2 An examination in public before an Examiner (a Planning Inspector) was held and the Examiner's report was published on 9 April 2014. The Examiner concluded that the submitted Charging Schedule should be approved without changes.
- 2.3 On 29 April 2014, a report was presented to Council seeking approval to the Charging Schedule. The report was and remains published in the normal way. A copy of the submitted Charging Schedule was Annexed to the report. Full Council resolved (unanimously) as follows:
  - “(1) to adopt the Epsom & Ewell CIL Charging Schedule;
  - (2) to note that CIL would be introduced from 1 July 2014 and that payment would be sought from all liable development proposals determined after that date;
  - (3) to note that appropriate publicity would be given to the adoption and publication of the CIL Charging Schedule.”
- 2.4 On 12 June 2014 a notice was displayed in the Epsom Guardian which announced the approval of the Charging Schedule and stated that Community Infrastructure Levy (CIL) would be collected from 1 July 2014, albeit the notice did not fulfil all the requirements of the legislation with regard to notification.
- 2.5 On 4 June 2014 Officers had signed off a number of related documents, including documents setting out a definition of the CIL chargeable area, the consequences of non-payment, and a social housing relief statement.
- 2.6 On an unknown date in April 2014 officers produced a further version of the Charging Schedule. This version became the published version. It differs from the submitted Charging Schedule which was approved by Full Council on the 29 April 2014 in a number of respects. Most of these differences are immaterial – a large part of the explanatory narrative text was removed; the date of approval was added, as was the date CIL was to take effect. However, it differed from the approved version in a number of respects which are material. Firstly, it differs in setting out the exemptions which are available. Some exemptions are optional under the legislation. It also differed in that against the description of the categories of development against which CIL would be charged, it included “Use Classes” to qualify the development types that would be liable for the different rates of CIL.

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- 2.7 The revised Charging Schedule was not reported to Council or any Committee. It was published on the Council's website in the week commencing 23 June 2014, and has remained published there ever since. It was also made available at other locations, including libraries. It was sent to the Secretary of State and to Surrey County Council.
- 2.8 From 1 July 2014, the Council began to collect CIL on liable developments.
- 2.9 In the vast majority of cases, the addition of the Use Classes as a qualification of the types of development in respect of which CIL would be charged, would make no difference. In some cases, the change would, if anything, reduce the amount of CIL due from developments. However, there are some theoretical categories in which it could make a difference, and one case has been identified where it seems the difference is material, and CIL ought not to have been charged at all.
- 2.10 Having identified the issue, officers sought advice from leading counsel. He has advised in detail on the subject. That advice is considered to be exempt from publication. In summary, however, Counsel advised that he considered the document issued and published by the Council to meet the legal requirements for a Charging Schedule, and that it should therefore be treated as valid, unless and until struck down by the Court. Counsel recommended that Council be made aware of the issue, and that Council be asked to endorse the published Charging Schedule.
- 2.11 It is expected that charging schedules will be reviewed, in order to ensure that the rates of CIL remain appropriate, in light of changing circumstances. In her report in 2014, the Examiner clearly anticipated that the Council's Charging Schedule would be reviewed within 2-3 years. Officers had intended to do so in any event, but the matters highlighted in this report emphasise the need to do so.
- 2.12 In light of the advice, officers have reviewed all of the developments where CIL has been levied. There are no other developments which are considered to be in the same position as the matter referred to in paragraph 2.9.
- 2.13 Officers' actions in amending the schedule were intended to remove extraneous text and only to clarify the chargeable development and to reflect good practice in this respect. The CIL Regulations and associated guidance are complex and were relatively new at the time. Officers did not realise that the amended schedule as published could potentially compromise the levy but acted out of the best of motives. As noted in the advice from Counsel, some of the implications are theoretical; they have not so far, and are not likely to occur in practice.

### **3 Proposals**

- 3.1 It is proposed that Council endorse the published Charging Schedule, as set out in Annexe 1.
- 3.2 Under the CIL Regulations, the Council has a positive duty to repay, with interest, any sums received which exceed the sum properly due. In the case referred to in paragraph 2.9, the entirety of the CIL paid was not properly due, and must therefore be returned with statutory interest, calculated from the day the sum was received.
- 3.3 It is proposed that the Licensing & Planning Policy Committee should initiate a review of the Charging Schedule, and that officers be instructed to undertake the work necessary to facilitate the review, including the formal consultation and examination processes and obtaining such external advice as may be required.

### **4 Financial and Manpower Implications**

- 4.1 As at 25 November 2016 £2,844,546 has been collected in CIL, with a further £551,196 invoiced, and other sums falling due as approved developments are built out. CIL has been committed to support a number of key infrastructure projects.
- 4.2 In the case of the planning application referred to in paragraph 2.9, the sum of £79,280.76 was collected in terms of CIL. The sum was received on 8 January 2016.
- 4.3 Under the CIL Regulations 2010, where a person is entitled to a repayment, they are entitled to receive the sum plus an additional sum by way of interest from the date they paid to the date of the repayment at a rate which is the higher of-
  - 4.3.1 0.5% per annum, and
  - 4.3.2 A percentage per annum equal to the Bank of England base rate less one percentage point.
  - 4.3.3 Assuming a repayment date of 22 December 2016, the total sum repayable will be £79,660.62
- 4.4 Repayment of the sum above will not, of itself, endanger any of the current projects which are proposed to be supported by CIL funds, nor will it endanger prospective CIL funded schemes.

4.5 **Chief Finance Officer's comments:** *Based upon the advice of Leading Counsel, this matter was deemed not to give rise to a contingent liability and as such no disclosure was made within the 2015/16 final accounts. A contingent liability arises where an event has taken place that gives the authority a possible obligation whose existence will only be confirmed by the occurrence of otherwise of uncertain future events not wholly within the control of the authority.)*

4.6 *Members are urged to agree the recommendations to ensure that future monies are collected under an approved Charging Schedule.*

## **5 Legal Implications (including implications for matters relating to equality)**

5.1 The legal implications are considered in the body of the report.

5.2 **Monitoring Officer's comments:** *Full advice on this matter has been sought from Leading Counsel; the Council is strongly advised to act in accordance with that advice, and agree the recommendations in this report.*

5.3 *It will be important to ensure that, when the Charging Schedule is reviewed, keen attention is paid to the detailed requirements of the regulations as to approval, issue, publication and notification of the new charging Schedule.*

## **6 Sustainability Policy and Community Safety Implications**

6.1 There are no Sustainability or Community Safety Implications arising from this report.

## **7 Partnerships**

7.1 There are no direct partnership arrangements arising from this report. The repayment of the CIL referred to in this report is likely to be reported as part of our Annual Monitoring Reporting process.

## **8 Risk Assessment**

8.1 There are risks arising as a result of what has happened in this matter. However, Leading Counsel has advised both that, in all the circumstances it would seem unlikely that a challenge would be brought, and the prospects of someone succeeding and obtaining a substantial remedy at this stage would be remote. However, there is a residual risk that a challenge might be brought and might succeed, and the Council will have to accept this. Unfortunately, if a challenge succeeded, it could void the Charging Schedule, and this could have consequences for all the CIL collected by the Council since July 2014. This residual risk will gradually become more remote, especially if the Charging Schedule is reviewed and a new schedule adopted following all necessary statutory procedures.

## **9 Conclusion and Recommendations**

- 9.1 In conclusion, an issue has been identified around the Charging Schedule issued and published by the Council. This cannot be entirely remedied retrospectively, but advice from Leading Counsel indicates that the Charging Schedule under which CIL has been charged since July 2014 is and should be treated as valid. He advised that this matter be drawn to the attention of full Council, and that we move to review the Charging Schedule at the earliest opportunity.

**WARD(S) AFFECTED: All Wards**