IN THE MATTER OF:

LONDON BOROUGH OF EALING
COMMUNITY INFRASTRUCTURE LEVY EXAMINATION

ADVICE

INTRODUCTION

1. I am asked to advise the London Borough of Ealing ("the Council") on issues relating to the progression of its draft charting schedule ("the Draft Schedule") for community infrastructure levy ("CIL"). The need for the advice arises in particular because of some legal advice obtained by Berkeley Homes Southall ("Berkeley") on that issue, which has been submitted to the "Ealing CIL Charging Schedule Examination" ("the CIL Exam"). That advice, prepared by Nick Grant ("the Grant Advice[1]") concluded that the Council was acting unlawfully, or arguably so, in seeking to have the Draft Schedule approved, and / or that it would be unlawful for the Draft Schedule to be approved by an independent examiner or adopted by the Council.

2. The Grant Advice concluded that the Council was acting (arguably) unlawfully on two separate bases, namely:

   (i) That it is "irrational" for the Council to progress with the examination of the Draft Schedule in circumstances where the emerging Local Plan has not yet been through its own examination and remains subject to change.

   (ii) That the Council has not "focused its mind on how much it seeks to raise from CIL" and / or that its evidence base is lacking in related ways. Part of this ground appears to be that the Council has misdirected itself by considering an aim of "revenue maximisation" in substitution for the statutory requirement to balance the harm that CIL may cause to viability against the benefits it brings.

3. I do not agree with these conclusions, certainly in so far as they are intended to express firm views as to the public law rationality of the Council's conduct, as opposed to mere statements of what may be "arguable". In my view, as a matter of law, the Council has acted lawfully in promoting it's Draft Schedule, and would be continuing to act lawfully by seeking approval

[1] I will use "GA *x"* to denote paragraph *x* of the Grant Advice.

of the Draft Schedule at the CIL Examination. It is not for me, as a legal adviser, nor for any other barrister including Nick Grant, to second guess the judgments which will in due course have to be made by the relevant CIL Examiner, but I see no legal reason why the CIL Examiner would not be entitled to approve the Draft Schedule if he considers that the relevant tests are met.

BACKGROUND

4. Much of the background is set out in the Grant Advice, to which the advice responds, and it will of course be familiar to those instructing me and to others who may need to consider this advice. In those circumstances I will not set the background out in great detail, but a brief recapitulation of the key background points set out in the Grant Advice, together with a few other pertinent matters, may be helpful for the purposes of exposition and readability:

   (i) The Council is the only London Borough which does not currently have an approved CIL charging schedule, and which therefore does not charge CIL on developments that are permitted in its area. The Council is perhaps understandably keen to rectify this.

   (ii) The Council published an initial version of the Draft Schedule in around 2023.

   (iii) The Draft Schedule was accompanied by Local Plan Viability Assessment (December 2023) (the "2023 VA"). The 2023 VA was prepared in part to support the publication of the Draft Schedule, and in part to support the preparation of the Council's new local plan, which was then at an early stage of development. As such, viability issues arising from CIL are only one aspect of the overall report. CIL specifically is addressed at section 7 of the 2023 VA. The discussion in that section makes the point that CIL will be only one aspect of viability, and that some projects will be viable regardless of CIL whereas others will not be viable without it, so that the importance of CIL *per se* should not be overstated. No doubt some of this may be the subject of discussion at the forthcoming CIL Examination, but given the way that the Grant Advice is framed I don't think I need to set out the detail here. It is in my view material to note the overall conclusions to section 7, as follows:

   > *7.12 The results of the appraisals indicate that applying a CIL would not – in the main - have a significant impact on the residual land values generated. Other than in a small number of cases, the movements in percentage changes in residual land values are relatively modest, indicating that applying a CIL is unlikely to prevent development coming forward or have a significant impact on affordable housing delivery. This is borne out by the experience of the*

neighbouring boroughs, which have had CIL charging schedules in place for significant periods.

7.13 At any of the tested rates of CIL, the burden on development would remain at an acceptably low level in most cases. The change in residual land value resulting from increases in CIL rates would generally be less than 20%. This indicates that developments could absorb the higher rates without any significant adverse impact upon land supply.

This conclusion is relevant, in particular, to the suggestion at GA 40 to 41 that the 2023 VA contains a misdirection as to the nature of the balancing test required under reg 14(1) of the CIL Regs.

(iv) On 9 February 2024, the Council published an "Infrastructure Delivery Plan" ("the IDP"), to support its forthcoming local plan. By this point, the Council had consulted on the Regulation 18 Local Plan, along with various other matters. The purpose of the IDP was to "set out the infrastructure that will be required to deliver planned housing and employment growth across the borough". Part 1 outlines the infrastructure baseline. Part 2 sets out "the infrastructure requirements to deliver the development strategy" of the emerging plan.

(v) The Council carried out a CIL Consultation from 28 February 2024 to 10 April 2024. Quod, on behalf of Berkeley, submitted representations to that consultation.

(vi) The Council published a revised Draft Schedule in October 2024, in which the rates for residential development outside of Central Ealing were revised down from £200/sqm to £150/spm. In consequence it published a modifications statement and carried out further consultation from 15 October to 12 November 2024. Quod again submitted representations on behalf of Berkeley.

(vii) The Draft Schedule is now due for examination, albeit a hearing scheduled for 4 June 2024 has been adjourned in light of Quod's recent (and very late) representations.

LEGAL AND POLICY FRAMEWORK

5. CIL is provided for in Part 11 of the Planning Act 2008 ("the 2008 Act"). The Community Infrastructure Levy Regulations 2010 ("the CIL Regs") are made pursuant thereto. The "overall purpose" of CIL is "to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land", subject to viability (see section 205(2) of the 2008 Act).

6. For CIL to be payable, a "charging authority" must make and have approved a "charging schedule" pursuant to Part 3 of the CIL Regs (and section 211 of the 2008 Act). The charging schedule will set out the rates of CIL that are payable for different types of development by reference to floorspace of new development, which is to be considered by reference to the "chargeable development", namely that permitted by a given planning permission (see regs 5-9 of the CIL Regs).

7. Section 211(2) provides as follows:

> *(2) A charging authority, in setting rates or other criteria, must have regard, to the extent and in the manner specified by CIL regulations, to—*
>
> *(a) actual and expected costs of infrastructure (whether by reference to lists prepared by virtue of section 216(5)(a) or otherwise);*
>
> *(b) matters specified by CIL regulations relating to the economic viability of development (which may include, in particular, actual or potential economic effects of planning permission or of the imposition of CIL);*
>
> *(c) other actual and expected sources of funding for infrastructure.*

8. The authority must use "appropriate available evidence" to inform its preparation of a charging schedule.

9. Section 212(1) requires a draft charging schedule to be formally examined by an independent "examiner". The examiner is required to consider whether the "drafting requirements" have been complied with and must make "recommendations", and give reasons for those recommendations. The drafting requirements are defined in section 212(4) as "the requirements of" Part 11 itself and the CIL Regs, "so far as relevant to the drafting of the schedule". In so far as the examiner considers that there is any respect in which the drafting requirements have not been complied with, he may make a modification to the draft (section 212A(3)-(4)), or, if he considers that there is no modification that would remedy the lack of compliance, he must recommend rejection of the draft (section 212A(6)-(7)). The charging authority may not approve a draft if the examiner recommends rejection, and may only approve it if he recommends modifications to remedy lack of compliance with the drafting requirements if it accepts those modifications or makes other modifications "sufficient and necessary to remedy the non-compliance" (section 213(1B)). The examiner may make other recommendations for modifications than those required to remedy lack of compliance with the drafting requirements, but the charging authority is not required to accept these.

10. Charging authority's and examiners are required to have regard to guidance issued by the Secretary of State about any matters connected with CIL, under section 221 of the 2008 Act.

11. Further provision is made about the content and procedure relating to charging schedules in Part 3 of the CIL Regs. Of note, reg 14 provides, materially:

> *(1) In setting rates (including differential rates) in a charging schedule, a charging authority must strike an appropriate balance between—*
>
> *(a) the desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and*
>
> *(b) the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area.*

12. The Planning Practice Guidance ("PPG") says that this "appropriate balance" test is "at the centre of the charge-setting process". Reg 14(5) makes clear that the charging authority's draft infrastructure list is "appropriate evidence" to inform the preparation of the charging schedule.

13. Regs 16-23 sets out requirements as to consultation prior to submission of the draft schedule to the examiner, the making of representations, the information required to be submitted to the examiner, and matters relating to the examination process and thereafter.

14. There is guidance about issues of contributions required from developers, and matters of viability, *inter alia* at ¶¶35 and 59 of the National Planning Policy Framework ("NPPF"). GA 27 sets out various aspects of the PPG which bear on CIL. I have already noted what the PPG says about the "appropriate balance" test in reg 14(1) of the CIL Regs. I will take as read most of the other matters referred to at GA 27, the broad effect of which is to make clear that charging schedules are required to be consistent with relevant plans, should facilitate growth and economic benefit to the area, should where appropriate take account of neighbouring local plans, and other such matters. I note, specifically, however, para 12 of the PPG, which says:

> *In relation to the levy, the relevant plan is any strategic policy, including those set out in any spatial development strategy.*
> *Charging schedules are not formally part of the relevant plan but charging schedules and relevant plans should inform and be generally consistent with each other. Where practical, there are benefits to undertaking infrastructure planning for the purpose of plan making and setting the levy at the same time. A charging authority may use a draft plan if they are proposing a joint examination of their relevant plan and their levy charging schedule.*

15. I have underlined the final sentence, which appears to be of some importance to the conclusions in the Grant Advice.

16. This also has to be seen in the context of para 18 of the PPG, which says as follows:

> *At examination, the charging authority should set out the projects or types of infrastructure that are to be funded in whole or in part by the levy. From December 2020, this should be set out in an infrastructure funding statement. The list of projects or types of infrastructure may already have been examined through a plan examination, in which case the purpose of providing it for the Community Infrastructure Levy examination should be only to evidence the infrastructure funding gap, not to re-examine the list.*
> *Where infrastructure planning work which was undertaken specifically for the levy setting process has not been tested as part of another examination, it will need to be tested at the levy examination. The examiner will need to test that the evidence is sufficient to confirm the aggregate infrastructure funding gap and the total target amount that the charging authority proposes to raise through the levy.*

17. Thus, the list of infrastructure may already have been examined as part of some other plan process, or it may not. Where it has been so examined, it will not be necessary to reopen or test the contents of the list. Where it has not, it can and must be tested at the examination. This is inconsistent with the idea that the list must have already been approved in the local plan process, or that there is a hard-edged requirement to have the plan process conclude first. It simply changes the parameters of the examination, because that process will not be able to take the list as read, without checking (to the extent needed for CIL purposes) its reliability and adequacy.

DISCUSSION OF THE GRANT ADVICE

18. The Grant Advice identifies two legal flaws, or two "potential" grounds of challenge, in the process followed by the Council so far. They are framed in terms of "public law" grounds of a kind which might be relied upon in a claim for judicial review.

19. I am bound to say that I find the framing of these conclusions in public law terms a little odd. Of course, the Council is a public authority that is amenable to public law, and must comply with its public law obligations. But in the present context, any claim for judicial review would be bound to be dismissed as premature, and I note that Mr Grant does not suggest that a claim for judicial review could be made at this stage, or would have any prospect of success.

20. The reason for that is that the Council is currently in the process of promoting its Draft Schedule, and the next stage of that process is consideration of the Draft Schedule at the CIL Examination. That involves consideration by an independent person, and the Council cannot lawfully adopt the Schedule until the Inspector reaches a conclusion, and then only subject to

the recommendations made by the Inspector. The Inspector will consider, *inter alia,* matters such as the sufficiency of the Council's evidence base, as part of his consideration of compliance with the Drafting Requirements. He will do so, furthermore, on a basis that is not confined simply to the public law legality of the Draft Schedule. In the meantime the Draft Schedule is of no legal effect. If, on the other hand, the Inspector does in due course reach conclusions which permit the adoption of the Draft Schedule (without or without modifications), any decision by the Council to adopt it will be informed by the Inspector's own conclusions.

21. That means that any claim for judicial review now would be dismissed on grounds of prematurity and / or alternative remedy (bearing in mind the duty of the CIL Examination to consider representations etc). But more fundamentally still, it means that the Council has not yet taken any public law decision with legal consequences which presents a suitable target for judicial review, and is still in the process of making its final decision on adoption. In theory, I suppose, a court could intervene (subject to alternative remedy), on the basis that the Council's decision-making or evidence is so defective as to be, not merely irrational to adopt, but irrational to proceed at all, but that is likely to present an impossibly high hurdle. The Council is entitled to proceed to put the material before the CIL Examination and ask for it to be considered.

22. I do not say this because I think the there is otherwise a danger that, on a more ordinary claim for judicial review, the Council is guilty of the errors identified by Mr Grant. As I explain below, even putting aside the points just made, I do not think that Mr Grant's points are well-founded. But in my view it is important nevertheless to draw attention to the rather theoretical way in which Mr Grant's points are framed, particularly in relation to proposed Ground 2, in circumstances where there is no possibility of a court being invited to rule on the correctness of his conclusions in anything like the form that they are currently presented.

23. This is not affected by what is said at GA 28, that the adoption of a charging schedule may be the subject of a claim for judicial review. No doubt it can, but that does mean that a charging' authority's decision to tender a draft schedule for examination may be the subject of such challenge. By the time any decision to adopt is made, the factual matrix of the claim will be different, and will be informed (at least) by the conclusions of the CIL Examination.

24. With this in the background, I will proceed to address the two "grounds" identified in the Grant Advice.

"Potential Ground (i)": Progressing to examination based on a draft local plan

25. This ground is that the Council is acting "irrationally" in seeking to examine, and in due course, subject to the CIL Examination, adopt, the Draft Schedule. I have already made some observations about the difficulty of framing this in terms of "irrationality", either at all or, most especially, at this stage of the process. To say that the Council is acting irrationally in *tendering* the Draft Schedule for examination strikes me as an almost impossibly high hurdle for any challenger to establish, and for the reasons I have given any argument based on that would be treated as premature or would be struck out on the basis of an alternative remedy. On the other hand, to say that, regardless of their consideration of the evidence, an examiner would not be rationally entitled to approve the Draft Schedule at this stage again seems to me an impossible hurdle.

26. The nub of this argument is, however, not so much irrationality as lack of compliance with the PPG. The Grant Advice makes essentially two points on the PPG, (a) that the PPG makes clear that the infrastructure to which regard must be had is that set out in relevant up-to-date plans, and (b) that the PPG "only suggests that draft local plans may be used where an authority is progressing to joint local examination".

27. I have quoted para 12 of the PPG above, which states that a draft plan "may" be used where the draft plan and draft schedule are to examined at the same time. That is, of course, in and of itself, inconsistent with a hard-edged rule that the infrastructure must be in an adopted plan.

28. It does suggest that it would be good practice for the draft plan and draft schedule to be examined at the same time, and one can of course see that there may be benefits in that. But the PPG does not purport to, and cannot, set out hard-edged legal rules. As its name suggests, it is guide to good practice. A planning or charging authority is always entitled to depart from the practice set out in the PPG. The PPG:

    (i) Does not say that it is not legitimate or lawful to proceed as the Council has done here, by proceeding with the Draft Schedule and CIL Examination at a time when the emerging plan is also being considered but without having them examined together. It

does not even say that it would be bad practice to do so. It simply says that it may be desirable or may be good practice to have them examined together.

(ii) Is only a guide to "practice", and does not purport, even in its own terms, to lay out hard-edged policies.

(iii) Is in any event, even taken at its highest, only policy and not law. It may be departed from. The question for the CIL Examination will be, not whether the Council has followed the PPG, but whether the drafting requirements are met, the satisfaction of which does not directly involve the PPG. The question on a future claim for judicial review, if the Council were to adopt the Draft Schedule with or without modifications, will be whether the CIL Examiner was entitled (applying public law principles) to consider that the drafting requirements were met. If he was, no separate question could arise at that point about compliance with the PPG, or any rate only in the most indirect way.

29. In the present case, the examination of the Draft Schedule is proceeding ahead of the plan. The CIL Examiner will need to, and will be able to take account of, any uncertainty introduced by that (in terms of whether the infrastructure list in the draft plan will be fully adopted) in considering the Draft Schedule. I do not accept, however, that there is any hard-edged rule that reference to infrastructure in the draft plan will be unlawful except in the case where the plan and the schedule are examined together. The PPG states no such requirement, and, more importantly, no such hard-edged rule appears in the 2008 Act or the CIL Regs.

30. It is striking that Mr Grant reaches his conclusions on this point without seeking to analyse the degree of uncertainty which may arise, or identify any particular respect in which conclusions in the plan process may undermine the Draft Schedule. It would have been open to Quod, on behalf of Berkeley, to identify specific ways in which uncertainty about the infrastructure in the IDP might feed through into doubts about the appropriateness of the Draft Schedule. This has not been attempted.

31. In the present context, the important contextual point is that, although the emerging plan has yet to be adopted, the level of growth set out in that plan has already been subject to testing as part of the London Plan process, and is set by the current, adopted, London plan. Meeting this level of growth is a *minimum* requirement for the emerging Ealing plan to be adopted. In

those circumstances, in particular, the Council is in my view entitled to proceed as it has. No doubt it would be open to objectors to the Draft Schedule to make arguments to the CIL Examiner as why that leaves an unsatisfactory uncertainty in the level of infrastructure, but those arguments must be made on the facts, not on the basis of some generalised argument that, regardless of context, it is unlawful or irrational to proceed.

32. Accordingly, in my view this "potential" ground is without merit.

"Potential Ground (ii)": Irrational evidence base

33. This ground is said to be that "the Council's evidence base cannot rationally support the reg. 14 balance".

34. This ground seems to me to suffer from the general difficulties I have already identified. Mr Grant accepts that "irrationality is a high threshold" (GA 29), but the rest of his advice pays no real attention to just how high that threshold is, *a fortiori* in the context of the consideration by a planning expert decision maker addressing highly technical evidence about matters of planning judgment and financial viability. To say that a decision is irrational if made without supporting evidence (*R (LCC) v SSEFRA* [2020] 2 WLR 1), means what it says: there must be no evidence (as I know from my own experience of that case). It is true that a decision is sometimes said to be irrational if there is an error of reasoning, that principle has nothing to do with the adequacy of the evidence base and by definition cannot be applied at this stage before the CIL Examination sets out its conclusions, which the Council may in turn then need to consider. Similar points can be made about the principle in *SSE v Tameside* [1977] AC 1014, which accords to the decision-maker the decision about what evidence is or is not needed, subject only to irrationality (see *R (Plantagenet Alliance) v SSJ* [2015] 3 All ER 261). It is simply impossible to apply these principles to the present context where the Council is required to, and has, submitted its Draft Schedule to the opinion of an independent expert decision maker who will consider the evidence in detail and who has yet to set out any conclusions or recommendations.

35. The Grant Advice seizes on a phrase at ¶7.4 of the 2023 VA, that the CIL Regs require a balance between "revenue maximization one the one hand and the potentially adverse consequences of CIL upon the viability of development across the whole area on the other".

The point made is that the CIL Regs do not speak of "revenue maximisation", but of the desirability of funding infrastructure through CIL. The suggestion is that this therefore involve a misdirection by the Council in the approach it has taken. This seems to me to be without merit:

(i) It is true that revenue maximisation per se is not the relevant goal which must be balanced. But provided that there is a funding gap, so that the total to be raised by CIL falls short of that total needed to fund relevant infrastructure, in practice it will be desirable to maximise CIL revenue, subject to the need to balance that against any impact on viability. The Council in this case takes the view, and as I understand it is not seriously controversial, that it has set CIL rates at a modest level, below that which is needed to fully fund relevant infrastructure. In those circumstances the difference between the desirability of funding the infrastructure, and the desirability of maximising revenue subject to that being below the full amount needed, is theoretical at best.

(ii) The overall conclusion of the 2023 VA, as I have identified above, at ¶7.13, is that the proposed CIL rates will not significantly affect land supply, so that the impact of the proposed rates on viability will not be problematic.

(iii) The 2023 VA is technical evidence which may be used to inform the Council's decision, and provides evidence to the CIL Examination. It is not, however, the Council's decision, and it is not, and does not purport to, strike the reg 14 appropriate balance. It therefore cannot bear the significance which the Grant Advice attaches to it.

36. What remains is a criticism that the Council has not set out the total amount it seeks to raise through CIL (GA 40), and / or demonstrated how that relates to the costs of providing necessary infrastructure in the plan period. Whether or not this has been clearly spelt out, this is clearly not correct. The context, as I say above, is that the Council has set CIL rates at a very modest level, which are well below the level of the full costs of providing necessary infrastructure. I have been provided with a copy of an "CIL Revenue Calculator", which sets out the amount of money that the Council expects to raise via CIL over various periods (1-5 years, 6-10 years and 11-15 years), on various different scenarios. On the scenario involving

the highest level of CIL revenue, scenario 2, the Council anticipates total revenue over the period of 15 years of £326mn. That can be set against anticipated revenue costs over a similar period of £2.937bn. Accordingly, first, the Council can demonstrate the amount it seeks to raise via CIL, and secondly that figure is only a fraction of the total costs of infrastructure over the same period.

37. In those circumstances, I would add that this provides a very clear and relatively straightforward basis for the CIL Examiner to conclude that the reg 14(1) test is met. The weight to be attached to the intrinsic desirability of funding infrastructure via CIL must be judged, here, on the footing that only a proportion of the infrastructure will be funded in this way, and it is plainly desirable that that, at least, should be achieved. On the other hand, the 2023 VA indicates that there will be no significant impact on viability if CIL is set at this level. It may well be that the Council could have justified CIL at a much higher level, albeit it is not necessary to decide this. On no view can it be said to be irrational for them to seek to justify it at this level, nor for the CIL Examiner to accept that justification.

38. Accordingly, I conclude that "potential ground 2" is likewise without merit.

CONCLUSION

39. I advise accordingly.

TIM BULEY KC

LANDMARK CHAMBERS

3 July 2025