

Scrutiny Call-in: CIL exemption – Officer responses

Point of examination	Detail	Provisional response
<p>Details of legal implications and legal risks associated with a decision being made on the basis of a verbal agreement regarding HIF while an extant contract specifies a different agreement</p>	<p>At the Cabinet Meeting, members asked questions about how much weight to give the existing written contract with Homes England as against the verbal agreement that the £15m funding would not be dependent on the CIL ECR being granted. However, it became evident in the meeting that legal advice did not appear to have been sought over whether these circumstances (making a decision based on a verbal agreement not on a written contract) could leave the council open to judicial review. Further scrutiny is therefore needed to provide members with details of legal implications and legal risks to the council.</p>	<p>Fundamentally, the risks are straightforward: the current agreement requires that the HIF funding would be contingent on CIL relief. If Cabinet was minded to approve the application(s) the risk of the specific clause is mitigated. If Cabinet does not approve the application(s), then the Council cannot meet the terms of the current agreement and therefore could not obtain the £15m HIF funding, unless the deed of variation was agreed by Homes England.</p> <p>The Council has been working with Homes England on a deed of variation to the HIF agreement, which originally related to the 2018 application. There are several revisions required, such as the deadlines for compliance, which, in the original agreement, were based on the earlier application. The need for obtaining a deed of variation to that agreement is clear and agreed by both parties. Throughout, the Council has sought and obtained legal advice. The report, and the wording of this section, was subject to review by the legal advisors.</p>

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		<p>The relevant clauses being referred to here make the assumption Homes England will only award HIF if CIL relief is granted. The rationale for this clause, and why the position and risk profile for Homes England has shifted, was explained at the Cabinet meeting.</p> <p>The decisions on the two CIL ECR applications are stand-alone decisions. There are consequences of these decisions for the HIF funding, but the clause in the contract (as currently worded) does not fetter Members decision making ability, it highlights the consequence of not granting the relief, i.e., the funding falls away. In hindsight, the wording of the Cabinet report could have been clearer. Members are not bound to agree the relief but should be mindful of the consequence of refusing the applications.</p>
<p>Details of alternative options to awarding the CIL ECR and how these were considered</p>	<p>At the Cabinet meeting, a member of the public (a representative of the Norwich Over the Wensum (NOW) Neighbourhood Forum covering the area around Anglia Square), drew attention to the fact that the Cabinet report did not detail CIL-funded projects that could have been funded through the Anglia Square CIL contribution. The Council Leader stated</p>	<p>The options before the Cabinet were either to award CIL relief, to not award CIL relief, or to award partial CIL relief. The report presented to Cabinet the implications and requirements in making a decision, and it was then for Cabinet to determine which option to take.</p> <p>As explained at the meeting, Norwich City Council pools its CIL contributions with 2 other Local</p>

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	<p>that this was due to the uncertainty over the Anglia Square development meaning that projects that would use CIL from Anglia Square had not been planned. However, the fact that projects had not been planned does not mean that the CIL funding could not have been utilised. Cabinet Members were assured that the decision they were making did not, like a planning application, have to take material factors into consideration, but instead should be a weighing up of the benefits and disadvantages of the decision for the city. Cabinet Reports should always consider alternative options and their possible outcomes, and in this case Cabinet should have more fully considered the outcomes of not awarding CIL exemption. The advantages of projects that could have been CIL-funded in an alternative scenario were not fully addressed. Scrutiny could fairly consider that laying out potential CIL-funded projects would form a thorough part of decision-making, as part of the review of options.</p>	<p>Authorities: Broadland District Council and South Norfolk District Council.</p> <p>At the point where CIL is collected following the grant of <i>any</i> planning application, the CIL monies go into a general infrastructure pool, and it is not known where it would be spent within the CIL charging area.</p> <p>80% of the contribution would have gone into the Greater Norwich pool and would be spent on projects across the Greater Norwich area.</p> <p>The neighbourhood element of retained CIL (15%) is not, as advised, spent in north, south, east, and west areas. It is simply pooled and spent on projects throughout the city. Again, whilst contributing to the wider area, any retained neighbourhood CIL may not necessarily have benefitted the immediate area around Anglia Square.</p> <p>The presentation and responses to Members questions outlined a number of S106 obligations and on-site provisions directly related to 3 of the 4 areas CIL is spent on: transport, green infrastructure and community infrastructure. The monetary value of this is circa £4.5million, more than the CIL requirement.</p>

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		<p>The presentation also outlined why an education contribution was not considered necessary.</p> <p>Further, if the development does not proceed because the viability without the CIL relief does not 'stack up' for the developer, then no CIL will be realised at all.</p>
<p>Consultation with neighbourhood representatives</p>	<p>The NOW representative asked whether any consultation had been carried out with representatives of the local area, including the neighbourhood forum, ahead of the decision being made. There was no such consultation. Scrutiny should consider whether neighbourhood groups, local businesses, local schools / school governors, the county council, and other partners with a stake in the infrastructure of the wider area should have been consulted, and whether such consultation would have led to more thorough decision-making. Scrutiny could usefully consider evidence from these groups and whether their input could add value to the decision-making process.</p>	<p>Unlike a planning application, a formal consultation is not required. The planning application for the site included extensive consultation. The report on the CIL ECR decisions was subject to significant input from the Council's legal advisors.</p>

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<p>Details on the Equality and Diversity and Health and Social impacts of the decision</p>	<p>The Equality and Diversity section of the Statutory Considerations at the end of the report states that “The Subsidy Control Assessment made as referenced in paragraph 78 sets out in detail how equality is achieved.” However, the paragraphs about the Subsidy Control Assessment in the report provide no detail on equality, only on competition and trade considerations. Scrutiny may request further detail on the Equalities Impact of the decision, including an Equalities Impact Assessment.</p> <p>The “Health, social and economic impact” section of the Statutory Considerations states that “It is not considered there are any health or social impacts arising from this decision.” This seems surprising given that CIL can provide green space (of benefit to health) and community facilities. Scrutiny may request an assessment of the health and social impacts of the decision.</p>	<p>The EQIA is attached as an appendix to the report to scrutiny committee.</p> <p>There are a number of S106 obligations and on-site provisions directly related to transport, green infrastructure and community infrastructure. The monetary value of this is circa £4.5million, more than the CIL requirement and it is known what would be delivered through this route, unlike the CIL route (see response above).</p> <p>Further, if the development does not proceed because the viability without the CIL relief does not ‘stack up’ for the developer, then no CIL will be realised at all.</p> <p>Health facilities are not funded through the CIL process. CIL receipted within the Greater Norwich area is allocated through the Infrastructure Investment Fund (IIF). Applications to the IIF are restricted to the four thematic groups of Transport, Education, Green Infrastructure and Community, as agreed within the Greater Norwich adopted CIL charging policy. The so-called Regulation 123 list confirming the eligibility for CIL was withdrawn from legislation in September 2019, and government has since announced that CIL will be replaced by a new type of Infrastructure Levy.</p>

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		<p>Until the future of CIL is more certain, the Greater Norwich authorities are required to proceed with their adopted CIL charging policy. The IIF continues to be ringfenced to the original four thematic groups, which does not include healthcare.</p>
<p>Consultation with Broadland, South Norfolk and the GNGB and details of how the decision could impact on pooled CIL.</p>	<p>The report does not detail the impact that the decision could have on pooled CIL arrangements with Broadland and South Norfolk councils or relationships with the GNGB. Some questions were asked about this at the Cabinet meeting; however, no formal consultation was done with these partners. Scrutiny could ask to see evidence of consultation with Broadland, South Norfolk and the GNGB.</p>	<p>Norwich City Council is both a CIL charging and CIL collecting authority. As such, the CIL Regulations enable us to make decisions on CIL ECR applications in accordance with the legislation and against our own policy requirements. Whilst we pool our CIL with neighbouring authorities, there is no requirement in law to consult with them in our decision-making processes.</p> <p>The GNGB has been aware for several years that this application would be likely to request consideration of exemption from CIL due to the exceptional circumstances of developing the site. The officer presentation did set out the ‘foregone’ CIL amounts which are set out here again for clarity:</p> <p>Admin fee - £108,125 Neighbourhood CIL - £324,322 Pooled CIL - £1,729,702</p>

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		<p>There have been no issues with relationships with the GNGB because of this application.</p>
<p>Clarification regarding the financial position of Weston Homes and how this may impact on decision-making</p>	<p>At the Cabinet meeting, the Council Leader stated that he had “had it from the horse’s mouth” that Weston Homes had made a loss in the last two years. Company reporting shows that Weston Homes made a pre-tax profit of £18.2m in the year to July 2022, and a profit of £2.9m in the previous year. Clarification is therefore needed as to which of these versions of accounts is correct. Scrutiny could request clarification of the financial position of Weston Homes and whether this could be considered a factor in the decision-making of the Cabinet.</p>	<p>Having sought legal advice, it is clear that from a legal perspective the financial position of the applicant (Here Sackville Properties) is irrelevant for the purposes of the ECR applications. What has to be considered are the tests set out in the Regulations, specifically Regulation 55(3) as set out in the report.</p> <p>The Regulations are clear that the assessment should be made on the economic viability of the specific phase/chargeable development. There is no mention of the assessment including any consideration of the overall profitability of the claimant.</p> <p>In accordance with the CIL Regulations 2010 the claimant for the CIL ECR must be the person with a material interest in the land. In this case: Columbia Threadneedle (company names are Sackville UK Property select II (GO) No 3 Limited and Sackville Property select II Nominee (3) Limited) (the legal landowner) and not Weston Homes (the developer).</p>

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		<p>Under Regulation 55(3) it is stated that a charging authority may only grant relief for exceptional circumstances if:</p> <p>(a) it has made relief for exceptional circumstances available in its area;</p> <p>(b) a planning obligation under section 106 of TCPA 1990 has been entered into in respect of the planning permission; and</p> <p>(c) the charging authority considers that to require the payment of CIL charged by it in respect of the development would have an unacceptable impact on the economic viability of the development.</p> <p>In accordance with the CIL Regulations (57(4)(ii), the ECR application has been accompanied by an assessment of the economic viability of the chargeable development (the individual phase(s)). The Regulations require this to be carried out by an independent assessor, appointed by the claimant with the agreement of the charging authority.</p>
<p>Details of meetings and correspondence between the applicant and Weston Homes and the Leader and Cabinet Members</p>	<p>Clarification is also needed as to the extent of engagement between Weston Homes and the Leader and/or Cabinet Members. Questions from members of the public highlighted that there had been no</p>	<p>In respect of process, in accordance with the CIL Regulations 2010 and the City Council's CIL ECR Policy and Guidance, a pre-application meeting occurred, and officers had visibility of the viability information before submission of the two applications.</p>

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	<p>engagement with the local community, neighbourhood forum, or other partners, yet the Leader’s comment suggested that there had been ongoing discussions with Weston Homes. Clarification is therefore needed as to the due process for the discussions with Weston Homes. Scrutiny could request records of meetings, including minutes, and correspondence between Weston Homes and the Leader and Cabinet Members. Scrutiny should also consider whether any non-pecuniary interests should have been declared in relation to lobbying either for or against the decision.</p>	<p>This included agreement to the use of the independent assessor, again in accordance with the CIL Regulations.</p> <p>Given that Weston has been the applicant for the planning application (and their development is driving the HIF), there will have been engagement through the planning application. Provided that Members didn't come to the decision on the CIL ECR applications with a closed mind, then the decision should not be vulnerable in accordance with the Localism Act S25(2). The extent of any meetings between parties was not a determining factor in the decision and therefore is not an appropriate reason for call-in.</p>
<p>Details of how CORP15 was calculated and whether this could inform decision-making</p>	<p>The Corporate Risk Register lists as risk CORP15 “Failure to draw down £15m of Housing Infrastructure Fund (HIF) money previously secured from Homes England (HE) to assist with the delivery of Anglia Square”. The residual risk score is listed at 12, with a target of 8. The Cabinet report could have set out the details of this risk, why it remained higher than target, and how the risk was calculated and what risk mitigation was in place. The details behind</p>	<p>Corporate risk 15 was calculated in line with the methodology in the Council’s risk assessment strategy.</p> <p>It is accepted the Cabinet report did not specifically reference CORP15 albeit the risk assessment section of the report did reference the risks associated with CORP15 – that the Council does not get the £15m HIF grant and therefore the development could not proceed.</p>

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	<p>this risk score could have provided information to inform the Cabinet's decision-making. Scrutiny could request details of how this risk has been calculated, risk mitigation that is in place, and could consider whether this information could have formed part of decision-making.</p>	<p>The situation on the HIF grant was outlined in the report and has been subject to separate scrutiny consideration as above.</p> <p>In practice, mitigation of CORP15 was inherent to the cabinet's decision and so specific reference to the named risk was unlikely to add value to the decision.</p>
<p>Where nationally and locally there have been other CIL ECR applications and, if they have been turned down, how that impacted on developments.</p>	<p>To inform Cabinet Members' decision, it would have been helpful to consider precedents of where CIL exemption applications have been made, whether other councils decided to award or reject CIL ECR, and the results of the award or rejection. Although the Anglia Square CIL ECR application should naturally be considered on its own merits, Cabinet could have considered any lessons learned from previous cases, as would normally be done with any other financial or policy decision. Scrutiny could therefore request details of previous CIL ECR applications at other councils and their outcomes.</p>	<p>It was officers view that this was not necessary. Each application for CIL ECR on any development site, in any area, should be made on its own merits and considering the site-specific viability assessments for that development and in accordance with the process as set out in the Regulations.</p> <p>Awards or refusals of the grant would be so site specific that they would be of little or no relevance to the decision Cabinet Members were making. Officers can provide a list of other CIL ECR applications and outcomes, but without knowledge of the site specifics of each case, it is not considered this would add much value to the decision-making process.</p>

