Date: 14 January 2014

BY EMAIL ONLY

Mr Simon Emerson
c/o Lynette Duncan
Programme Officer
c/o New Forest District Council
Appletree Court
Beaulieu Road
Lyndhurst
Hants SO43 7PA

Dear Mr Emerson,

NFDC CIL Reference DSC16

NFDC CIL Charging Schedule Examination

I write following the publication of your note ED-7 in relation to the examination of New Forest District Council's proposed CIL charge. Specifically I write to respond to your questions in relation to the proposed retail charge.

Q4.2 *Should I take into account the evidence referred to in CILR2?*

WYG Response: We would reiterate our previous position that the Council introduced new evidence through CILR2 and that there is no clear link between its viability evidence and the documents to which it refers in CILR2. These previously prepared documents should therefore not be allowed to be introduced as evidence. That said, for the reasons set out in our response in March 2013, we do not consider that the content of CILR2 justifies the Council's position. Indeed, in some ways (such as the references to Parking Standards), the 'evidence' reinforces our position that there is no difference between large and small retail units and that the draft charging schedule can only justify a zero rate for retail.

I note that you have acknowledged our representations in response to Questions 4.3, 4.4 and 4.5 and that it is not necessary to repeat these now.

Q4.10 *Bearing all the above in mind (and on the assumption that I confirm my overall preliminary conclusion in ED3) does the available evidence for the New Forest justify a charge based on a specific description of a superstore only, without the need to justify a specific floorspace threshold?*

WYG Response : We do not accept that a differential rate for retail, based on a definition of 'superstore/supermarket' and 'other' can be introduced. I would refer to the legal submission made following the publication of CILR2 (attached to this letter for ease of reference). Specifically, I would refer to paragraphs 3 and 4 which state "…the duty of the examiner is to consider whether the proposed

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charging schedule has actually used and been informed by the appropriate available evidence (s212(4)(b) and s212(7))". In this respect, NFDC has not submitted any *relevant evidence* to demonstrate that 'superstores/supermarkets' are different uses. I note that you refer to your recent conclusion in respect of the London Borough of Merton's charging schedule. However, having reviewed the evidence base of that authority, I note that the viability evidence in that case specifically scrutinised the viability of retail warehouses/superstores against the viability of other forms of retail. Through their evidence, it would appear that they established this distinct use *within the borough*. NFDC has not provided any such "relevant evidence", and as such they are not able to make a retrospective distinction between different aspects of a retail use within their district. The only conclusion that can be drawn from NFDC's evidence is that "retail" is "one use" and no differential can be made on the basis of size or by reference to a definition of a retail unit that, in effect, relates to its size.

Finally, we are all aware of the proposed amendments to the CIL Regulations 2014 and that a differential by size would be allowed for future charging schedules under an amendment to Regulation 5(2) where relevant evidence is supplied. However, I would like to draw specific attention to the transitional arrangements set out in Regulation 14. Specifically, Regulation 14(2) states that Regulation 5(2) and (3) **does not apply in relation to a charging schedule if a draft schedule was published in accordance with regulations 15 of the 2010 Regulations before these regulations come into force.**

Very clearly, the transitional arrangements state that the new regulations will not apply to existing draft charging schedules and the consideration of NFDC's case should therefore proceed on the regulations in place at the time of its publication.

On the understanding that the above points, and all our previous evidence is taken into account in your examination of NFDC's CIL charging schedule, we do not consider it necessary to re-open the examination hearing.

Yours Sincerely,

Gary Morris
Director
WYG Group

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New Forest Community Infrastructure Levy Examination

Legal Submission

Basis of Submission

1 The note has been prepared on behalf of Burt Boulton Holdings Ltd in response to CILR2. It addresses whether the Council can properly rely on the background documents referred to in CILR2 as evidence to support the proposed charging schedule. This note does not deal with the substantive issue – which is whether the new evidence does, indeed, support the Council's proposed position. The WYG paper makes it clear that the background documents do not support the Council's approach.

Appropriate Available Evidence and Relevant Evidence

2 The Council are entirely correct that they have an enormous latitude about what they treat as "appropriate available evidence", and it is equally clear that they should be pragmatic about the evidence on which they choose to rely.

3 However, the duty of the examiner is to consider whether the proposed charging schedule has actually used and been informed by the appropriate available evidence (s212(4)(b) and s212(7)).

4 In order to establish this the Council have to identify the "relevant evidence" on which they rely. The "relevant evidence" is that part of the evidence on which the Council have based their conclusions. The nature and content of the "relevant evidence" is clear. It is only that which has been submitted to the examiner under Regulation 19(1)(e) and been published, as far as practicable, on the Council's website in connection with the CIL examination (Regulation 19(3)(b). If a copy was provided to the examiner, and was properly published, it can be relied upon. If it has not been provided to the examiner, or was not properly published, it cannot be relied upon.

5 Although we stand to be corrected, we do not believe that copies of the documents referred to in CILR2 were provided to the examiner as part of the Regulation 19(1) submission. Nor were they published in the unambiguous way described in Regulation 19(3).

The Council's Stated Position

6 In fact the Council has always made its position clear. In the Draft Charging Schedule: Context and Rationale document the Council says in paragraph 5.1:

> *"The Council has relied on three pieces of evidence to produce its charging schedule*
>
> - *The Core Strategy*
> - *The Infrastructure Delivery Plan*
> - *The Community Infrastructure Levy Viability Assessment"*

7 No reference is made to other evidence. Objectors should be able to rely on that document as a statement of the evidence on which the Council intended to rely.

8 Indeed, in the section on retail issues starting at paragraph 6.22 of the Context Document the only reference to evidence is to the viability report. Paragraph 6.23 refers to the "evidence"

that supports its conclusions and, in context, it is plain that it is referring solely to the viability evidence.

9 CILR2 now suggests that the Council was in fact relying on other evidence. If so, it failed to specify it as relevant evidence, and it cannot properly be introduced, after the event, to support the case being presented. In fact it appears that the Council only identified the evidence in response to the objections being made at the CIL examination.

Indirect Relevant Evidence

10 It may be argued that the documents were "submitted" or "published" because they were referred to in a document list or in documents that were properly part of the relevant evidence. We do not believe that that is sufficient.

11 The consultation and examination process should give objectors, as well as the examiner, the opportunity to consider whether the proposed charging schedule is supported by the evidence. The "relevant evidence" should be specifically identified, and published, so that objectors can test the basis for the Council's proposed charges. It would undermine the process if, simply because of the publication of a list or a general reference to the Core Strategy, objectors had to carry out a search through all local plan documents and the supporting evidence to establish whether the Council does indeed have material that supports the CIL conclusions. If a Council has evidence, and intends relying on it, that evidence should be clearly and specifically identified as part of the CIL examination process.

Conclusion

12 In the New Forest CIL examination the status of, for example, the CIL viability report the position is clear. It was submitted and published as relevant evidence. It seems equally clear that there was no explicit consideration of other evidence now referred to in CILR2 at the time that the charging schedule was being prepared. There is therefore no "relevant evidence" on which the Council can rely other than the three documents referred to in the CIL Context Document. Allowing the Council to rely on other documents would simply be wrong.

SNR Denton
1st March 2013