

PLANNING APPEAL BY GLADMAN DEVELOPMENTS LIMITED

IN RESPECT OF LAND AT PEAR TREE LANE, EUXTON

PINS REF. APP/D2320/W/20/3247136

RESPONSE TO COSTS APPLICATION ON BEHALF OF

CHORLEY BOROUGH COUNCIL

Planning Practice Guidance ('PPG') concerning the award of costs

1. So far as relevant, PPG provides that costs may be awarded where a party has behaved unreasonably, and the unreasonable behaviour has directly caused another party to incur unnecessary expense in the appeal process [16-030-20140306]. 'Unreasonable' in this context is used in its ordinary meaning, established in **Manchester City Council v SSE & Mercury Communications Limited** [1988] JPL 774¹, and unreasonable behaviour in the context of an application for an award of costs may be procedural or substantive (relating to the issues arising from the merits of the appeal) [16-031-20140306]. The key issue to which the **Manchester City** case refers, in the context of considering whether or not to award costs, is whether the local planning authority ('LPA') has acted unreasonably in that it has been unable to support its decision by any substantial evidence.
2. Applications for costs should be made as soon as possible. In the case of hearings and inquiries all costs applications must be formally made to the Inspector before the hearing or inquiry is closed, but as a matter of good practice, and where circumstances allow, costs applications should be made in writing before the hearing or inquiry. Any such application must be brought to the Inspector's attention at the hearing or inquiry, and can be added to or amended as necessary in oral submissions. Anyone making a late application for an award of costs outside of these timings will need to show 'good reason' for having made the application late, if it is to be accepted for consideration [16-035-20161210] (underlining ('u/l') added).

¹ JPL report enclosed.

Late application

3. The Inspector's Case Management Note and Directions following the telephone conference call on 23 April 2020 recorded as follows in respect of costs:

'The Council and Appellant confirmed they do not intend to make applications for costs. If this changes, any applications should be submitted in writing before the opening of the Inquiry. ...' (u/l added).

4. The exchange of evidence took place on 26 May 2020, and a second case management telephone conference call was held on 28 May 2020. The issue of costs was not referred to further in that call. Rebuttal proofs were exchanged on 9 June 2020.
5. The Appellant's intention to make a full costs application was not revealed until after the close of all of its evidence to the inquiry, at the end of Day 6. A version in writing was received that evening at 20.32 and *'the final version ... with minor amendments'* on Day 7 (the day of closing submissions) at 08.44.
6. The application refers, under *'The Timing of the Application'*, to a list of matters in respect of the second Joint Memorandum of Understanding dated April 2020 (**'MOU2'**, CD7.23) (and associated Statement of Common Ground dated May 2020 (CD7.34)) and asserts that *'none ... are remotely credible'*. It also refers to the weight attributed by the Council to affordable housing (**'AH'**) within the application (see further under paragraphs 12 & 25-26 below).
7. The Applicant seeks to explain its decision to make a surprise costs application in complete disregard for the direction at paragraph 3 above on the basis that it *'wanted to understand'* the Council's case in favour of reliance on the MOU2 as part of the calculation of local housing need (**'LHN'**) in accordance with the standard method (**'SM'**). That explanation is itself *'simply not credible'*.
8. The Council's reliance on MOU2 is explained in detail in the evidence (proof & rebuttal) of Mr Ireland, with some narrative addition by Ms Whiteside. The Appellant is amongst the most prolific and experienced users of the planning appeal system, well able to understand the evidence provided and the importance that any costs application should be made in accordance with PPG and the Inspector's direction in particular. It has the significant added benefit of representation by leading counsel. It is *'simply not credible'* that this assemblage of planning talent should not have understood the evidence.

9. The Appellant's opening submissions (ID01), at [31-50], did not profess a failure to understand the Council's reliance on MOU2. It disputed that reliance in detail instead. Mr Donagh gave evidence disagreeing with the Council's case, but did not suggest that he did not understand it. Neither did Mr Lee. The complete absence from the inquiry of questions on behalf of the Appellant seeking clarification or elucidation from the Council's witnesses, as opposed to challenging their evidence, confirms that the Council's case on the housing requirement was at all times well understood.
10. This application is made in flagrant breach of the guidance in PPG as to timing and the Inspector's specific direction and without any credible justification. The Appellant has not, whether by its application or conduct throughout the inquiry, begun to justify the timing of this application. It should be refused on the basis of timing alone, if PPG is not to be revised and last minute 'surprise' applications based on a 'need to understand' not to become routine. With reference back to [16-035-20161210] (paragraph 2 above), the Appellant has clearly not shown '*good reason*' for having made the application late, such that it should be accepted for consideration.

Scope & nature of the application

11. The application refers to a list of matters in respect of MOU2 in particular. They also appear as part of the Appellant's closing submissions ([31]). It also states under 'The Application for Costs' that '*more detail ... is provided in the Appellant's closing submissions*' ([7]). A costs application should properly, if it is to be fair to the recipient, be complete and it is not acceptable to seek to incorporate by reference unspecified parts of other extensive submissions. The responses below are to the application document itself.
12. The application also refers to the weight attributed by the Council to AH within the application. That second matter does not, however, find its way into the Appellant's submissions under '*The Application for Costs*'. It is therefore not considered to form any part of the basis of the current application, and is referred to further only briefly below.

Responses to the application

13. The Council's responses to paragraph 7 and points (1) to (8) at paragraph 3 of the application are as follows.

Point (1)

14. [Fn37], [60] and the definition of LHN within the National Planning Policy Framework ('NPPF') refer to PPG generally and '**Housing and economic needs assessment**' section in particular. Within that section, [2a-013] is amongst a suite of paragraphs addressed to the calculation of LHN in accordance with the SM. It facilitates, where circumstances allow (and on an interim basis), the distribution of LHN which otherwise results from the preceding paragraphs within this section of PPG.
15. Mr Donagh agreed that Central Lancashire is an area '*where plans cover more than one area*' and that [2a-013] is engaged. He agreed that its first sub-paragraph was permissive, i.e. not exhaustive, and that a start had been made on producing strategic policies jointly within its terms. He agreed that '*the defined area*' within the second sub-paragraph referred to more than one local authority area and that MOU2 does not seek to go below the total sum for the authorities combined. He also agreed, with reference to the third sub-paragraph, that the ability to re-visit the LHN calculation pending publication of a spatial development strategy was implicit, referring to authorities being encouraged to review LHN regularly. The basis for distribution to the Council of a housing requirement figure different from that resulting from preceding paragraphs within this part of PPG in principle was thereby acknowledged by the Appellant's witness. It is not helpful that the costs application does not reflect this evidence.
16. The fact that the distribution resulted in the Council's figure being half was explained and justified in evidence by Mr Ireland. The Council produced substantial evidence in support of its housing requirement figure, and there was no element of unreasonableness in that part of its case. Indeed, the costs application does not direct any specific criticism at that part of the Council's case.

Point (2)

17. PPG [2a-013] is a clear statement that calculation of SM should or need not end at or with the output from the preceding paragraphs within that section of PPG. The Council has not

introduced an additional step, but applied [2a-013] instead. There is no element of unreasonableness in having done so

Point (3)

18. It is clear from [2a-013] as a whole and the third sub-paragraph in particular that the three Central Lancashire Councils were entitled to undertake the distribution exercise at MOU2 on an interim basis ahead of adoption of a Local Plan. Mr Donagh's evidence supports this view (and it is, again, not helpful to rely on submissions contrary to that evidence). It is completely unclear where reference to the Local Plan finding the requirement sound derives from within PPG.

Point (4)

19. The quotation here is from NPPF's definition of 'LHN' as follows: *'The number of homes identified as being needed through the application of the standard method set out in national planning guidance (or, in the context of preparing strategic policies only, this may be calculated using a justified alternative approach as provided for in paragraph 60² of this Framework)*'. MOU2 itself and the Council's evidence confirm that the number of homes required in Chorley is identified in accordance with the SM, and not an alternative approach.

Point (5)

20. [2a-013] is not *'specifically addressed to plan making'* but to the distribution of housing requirements where joint plans are in preparation, and is agreed to envisage the interim adoption and variation of housing requirements outside *ex hypothesi* the plan-making process itself. [2a-016]³ alerts the reader, by link, to the existence elsewhere within PPG of guidance concerning the assessment of housing land availability for the purposes of establishing

² *'To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance – unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for.'* (underlining added)

³ *'There is separate guidance on how the standard method for assessing local housing need applies to calculating 5 Year Land Supply and the Housing Delivery Test. Paragraph: 016 Reference ID: 2a-016-20190220'*

whether a LPA is able to demonstrate a five year housing land supply ('5YHLS'). [2a-016] does not dilute or qualify [2a-013] at all.

Point (6)

21. There is no policy or other requirement that MOU2 must be part of a DPD or SPD in order to be used for decision-making: (i) there is no wording within [2a-013] that supports or requires that this should be so; (ii) the wording within that paragraph actually indicates to the contrary; and (iii) it requires an interpretation of [2a-013] involving departure from the approval of distribution outwith the plan-making system approved in *St Modwen Developments Ltd v. SSCLG* [2016] EWHC 968 (Admin) (CD11.04) and *Oadby & Wigston BC v. SSCLG* [2016] EWCA Civ 1040 (CD11.17) which that paragraph has been designed to carry forwards into the context where LHN is calculated in accordance with the SM.

Point (7)

22. It is perfectly reasonable that the Council should invite the inspector to give '*full weight*' to MOU2, albeit not that weight to which it would be entitled to attract pursuant to PCPA 2004 s.38(6) as a DPD. This is so in light of the facts that: (a) MOU2 is supported by a substantial evidence base (the Central Lancashire Housing Study (CD7.05)); (b) draft MOU2 was subject to wide-spread consultation over seven weeks (CD7.24 [1.12-14]); (c) there was substantial engagement in that consultation; and (d) consultation responses were the subject of a detailed Outcomes Report (CD7.24) and a detailed report presented to the Central Lancashire Strategic Planning Joint Advisory Committee (ID24).

Point (8)

23. MOU2 is plainly a material consideration, as the evidence of Messrs Ireland, Donagh and Lee all consistently reflect.

Conclusion

24. All that is necessary, bearing in mind the way in which the costs application is put, is that the Council should be able to demonstrate that its reliance on MOU2 has been credible and supported by substantial evidence. The responses set out above clearly reflect that that is so.

Other

Affordable housing ([5])

25. Mr Stacey confirmed that the evidence in respect of AH should be considered *'in the round'*. The evidence, agreed by Mr Stacey, showed that Chorley has met, over the recent past, 93% of identified need for AH, performed well compared with Preston & South Ribble, a supply of AH in close proximity to the appeal site, and a much reduced shortfall since November 2017. There was limited evidence Ms Whiteside could refer to concerning how the Council would address the future need identified by Mr Stacey, but it was reasonable nonetheless to consider that limited weight should attach to the benefit of the proposed AH provision bearing in mind: (i) AH provision made (35 units) and authorised and remaining to be built (91 units) in Euxton; (ii) the findings of the Housing Study that the need to AH had changed, with no need to provide significant quantities of houses under the new definition of 'AH ownership', and a clear and acute need for affordable rented housing; and (iii) the operation of the sub-regional Choice-based lettings scheme, whereby lets or vacant units are made available to applicants across the sub-region. The volume of lettings delivered and in the pipeline in Euxton, and the risk of localised oversupply in the short term were also referred to.
26. Weight attaching to benefits is, as Messrs Moger & Stacey agreed, relative. It is to be weighed, in accordance with the Council's case, against the very substantial weight attaching to the harm resulting from the grant of planning permission for permanent development of safeguarded land ahead of the Local Plan review. It is entirely reasonable that the Council should have considered that the weight attaching to AH should be *'limited'* in that context.

Role reversal ([8])

27. The Appellant's argument based on role reversal does not work to its advantage. The choice here is binary, so what has to be contemplated is that the Council would have advocated the Appellant's distribution. This assumes the Council's promotion of a distribution: (a) *'markedly different spatial approach to development across the [HMA] than outlined in Policy 1'* (Mr Lee [5.2.13]); (b) unexplained (per Mr Donagh's evidence) in terms of population, jobs distribution and affordability etc; (c) which Mr Lee agreed makes *'no sense'* in the context of supporting the City Deal; (d) had not been the subject of consultation; and (e) supposes, in effect, that Chorley is an island. One only has to set these matters out to envisage the severe criticism

that presentation of a case along these lines by the Council would have drawn from the Appellant. And rightly so.

*The **Harrogate** case & previous appeal decision*

28. The Council does not rely on the **Harrogate** case in support of its case in accordance with MOU2.
29. There are differences between the circumstances now and those prevailing at the time of the previous appeal decision; but to say that they are '*wholly different*' involves an error of judgment.

Conclusion

30. The Council therefore requests that the costs application be refused:
 - it has not been made on a timely basis in accordance with PPG and the Inspector's specific direction, and there is no credible reason let alone '*good reason*' why this should be so; and
 - it is without merit, the Council having provided substantial evidence in support of distribution in accordance with MOU2 and behaved reasonably in all relevant respects.

SIMON PICKLES

9 July 2020

Landmark Chambers

London EC4A 2HG