IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Claim No. CO/1962/2020

B E T W E E N:

THE QUEEN
(on the application of GERALD GORNALL)

Claimant

-and-

PRESTON CITY COUNCIL

Defendant

-and-

(1) SENTANTII HOLDINGS LIMITED
(2) COMMUNITY GATEWAY ASSOCIATION LIMITED
(3) TIM FORREST
(4) JOHN HOLDEN
(5) WAINHOMES (NORTH WEST) LIMITED
(6) MICHAEL WELLS
(7) SEDDON HOMES LIMITED
(8) STORY HOMES LIMITED

Interested Parties

SUMMARY GROUNDS OF RESISTANCE

References:

- *in the form [tab/page] are to tabs and pages in the claim bundle;*[1] *and*
- *in the form (SFG [paragraph]) are to paragraphs in the Claimant's Statement of Facts and Grounds ("***SFG***") at [2/9-38].*

Essential pre-reading (time estimate 2.5 hours):

- *SFG [2/9 - 38] & these Summary Grounds*
- *Report of the Director of Development to the Leader of PCC ("***the DDR***") [7/178-187]*

[1] Note that it appears that the electronic pagination of the Claimant's PDF is substantially out of alignment with the printed pagination. The page numbers referred to in the Grounds are the printed pagination, not the electronic.

- *Joint Memorandum of Understanding & Statement of Co-operation Relating to the Provision and Distribution of Housing Land (April 2020) ("**MOU2**")[9/198-205]*
- *MOU2 Statement of Common Ground (May 2020) [5/170-3]*
- *National Planning Policy Framework 2019 ("**NPPF2**") [11, fn7, 27, 73, fn37, 212] [17/339 - 243]*
- *National Planning Practice Guidance ('**PPG**') paragraph: 013 Reference ID: 2a-013-20190220 ("**Para. 2a-013**") [18/346]*

Enclosures:

1) *PCC's reply to the Claimant's Pre-Action Protocol ("PAP") letter (dated 2 June 2020)*
2) ***St Modwen Developments Ltd v SSCLG & East Riding of Yorkshire Council** [2016] EWHC 968 (Admin)*
3) ***Oadby & Wigston BC v SSCLG & Bloor Homes** [2016] EWCA Civ 1040*
4) *Extract from previous version of the Planning Practice Guidance*
5) ***R. (Taylor) v Maidstone BC** [2004] EWHC 257 (Admin).*

INTRODUCTION

1. The Claimant applies for judicial review of the decision ("**the Decision**") by the Leader of the Defendant ("**PCC**") on 17 April 2020 to approve MOU2 [6/176 – 177].

2. PCC resists this claim in its entirety. In summary, PCC submits that permission should be refused for the following reasons:

   (a) **Ground 1.** It is not arguable that PCC, through DDR, either misinterpreted or misunderstood national planning policy. PCC's calculation of local housing need ("**LHN**") by aggregating and then distributing is plainly in accordance with PPG.

   (b) **Ground 2.** The content of the report dated March 2020 from the planning consultants Iceni ("**the March Iceni 2020 Report**") referred to was not erroneous.

(c) **Ground 3.** It is not arguable that MOU2 is a development plan document ("**DPD**") within regs. 5(1)(a)(i) and/or (iv), and reg. 6, of the Town and Country Planning (Local Planning) (England) Regulations 2012 ("**the 2012 Regulations**"). MOU2 also does not have any effect separately from NPPF2, which cannot be a DPD.

(d) **Ground 4.** This ground refers to the appeal decision relating to land to the South of Chain House Lane, Whitestake, Preston dated 13 December 2019 ("**the Chain House Lane decision**") and the Claimant's own pre-condition for its withdrawal. It is unarguable if not deemed withdrawn.

(e) **Ground 5.** The Decision was not *ultra vires* because of any failure to comply with PCC's Constitution because: (1) the Decision was not reserved to PCC's Full Council (MOU2 is not a DPD: see Ground 3); and (2) a "*key decision*", as defined in PCC's Constitution, is not reserved to the Full Council.

(f) The Claimant has an alternative remedy, namely an appeal to the Secretary of State ("**SoS**") pursuant to s. 78 of the Town and Country Planning Act 1990 ("**TCPA 1990**").

(g) Pursuant to s. 31(3C) and (3D) of the Senior Courts Act 1981 ("**SCA 1981**"), even if the Decision were in error of law, it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred because the LHN figure for PCC would have been lower, namely 241 dpa, not 410 dpa as set out in MOU2.[2]

FACTUAL BACKGROUND

3. PCC are content to use the chronology of events at [3/39 - 43] for the purposes of considering the issue of permission, but would wish to emphasise the following aspects of the background to this claim.

Central Lancashire

[2] These figures in MOU2 are as at April 2019. They have been updated in May 2020 through a Statement of Common Ground between the Councils (see further paragraph 21 below). The Statement of Common Ground calculates a figure of 404 dpa for Preston. Notwithstanding this, the point is the same.

4. PCC is within Central Lancashire, itself defined as the area covered by it, South Ribble Borough Council ("**SRBC**") and Chorley Council ("CC") (together "**the Councils**"). The Councils, with Lancashire County Council, have a history of joint working, reflecting both the compact nature of this part of Lancashire and its focus on the urban core. Joint working is formally constituted in a Joint Advisory Committee established in 2008.

5. The area covered by the Councils functions as one integrated local economy and travel to work area and is a single Housing Market Area ("**HMA**") (CLCS at [1.5]). Containment levels approach 80% for travel to work and exceed 80% for housing moves (when long distance moves are excluded) (ibid).

6. The history and depth of joint working by the Councils is reflected in the current development plan, i.e. the Central Lancashire Core Strategy (adopted July 2012) ("**CLCS**") [16/330 - 338]. The purpose of the Core Strategy is to set the overall strategic direction for planning the area over the period from 2010 to 2026, in line with national policies [16/333]. CLCS Policy 1 sets out the overall spatial pattern of development across Central Lancashire. Policy 4 sets out the following minimum housing requirements for each of the Councils:

PCC:	507 dwellings pa ("dpa")	38%(rounded)
SRBC:	417 dpa	32%
CC:	417 dpa	32%
Total:	1,341 dpa	100%

(with prior under-provision of 702 dwellings also being made up over the remainder of the plan period equating to a total of 22, 158 dwellings over the 2010 - 2026 period). [16/238]

<u>Joint Memorandum of Understanding and Co-operation relating to the Provision of Housing Land (September 2017) ("MOU1")</u> [9/198 -205]

7. MOU1 records its purpose as being to confirm and demonstrate an approach agreed by the Councils concerning the distribution of housing in the HMA, informed by the Strategic Housing Market Assessment, August 2017 ("**the SHMA**") [9/199] at [3.1]. It records the work then undertaken to assess the full objectively assessed need for housing ("**FOAN**") in Central Lancashire, in accordance with a previous iteration of NPPF ("**NPPF1**"), and sets out agreement, in light of the assessment of FOAN, to

continue to apply the housing requirements set out in CLCS Policy 4 (paragraph 6 above) until the adoption of a replacement local plan or until new evidence emerged which rendered MOU1 out of date [9/203] at [6.1].

8. MOU1 was not adopted as a DPD or otherwise subject to the 2012 Regulations. No challenge was brought to MOU1, whether on the basis that it was a DPD or otherwise.

<u>MOU2</u> [8/188 - 197]

9. MOU2 was prepared in light of reports prepared by the planning consultants, Iceni, i.e. "**the October 2019 Iceni report**" [39/522 - 615] and "**the March 2020 Iceni report**" [40/616 - 718]. The March 2020 Iceni Report, to which Ground 2 refers, records that it had *"been commissioned to update and develop elements of the analysis set out in the [SHMA] and principally do two things:*

- *Advise on the scale of housing need and the interim distribution of housing across Central Lancashire to inform a revised Joint Memorandum of Understanding; and*

- *Provide a robust up-to-date evidence base regarding the scale, type and mix of housing which is needed to inform the development of the local plan and consideration of the housing mix of individual development sites."* [12/274] at [1.2]

10. It further explains as follows:

> *"In instances where [LHN] is being calculated for Local Plans which cover more than one area – as is the case in central Lancashire which has an existing joint Core Strategy and is working to prepare a new joint plan – [PPG] states that the housing need for the defined area should at least be the sum of the [LHN] for each local planning authority within the area. It will be for the relevant strategic policy-making authority to distribute the total housing requirement which is then arrived at across the plan area. Councils are required to both develop and maintain Statements of Common ground by Para 27 in [NPPF2] which makes reference to these being available through the plan-making process, Such statements are expected to address the distribution of needs in the area and record agreements that have been reached. The revised MOU is intended to demonstrated effective and ongoing joint working consistent with Para 27 in the Framework."* [12/279] at [2.19]

11. MOU2 refers to the Council's joint working arrangements in the context that their areas comprise a single HMA [8/190] at [1.1-4]. It sets out the housing requirements in accordance with CLCS Policy 4, acknowledging that these have been superceded by the standard methodology ("**SM**") [8/190 - 191] at [2.4]. In summary, the SM takes projections of household growth (particularly driven by demographic trends over the 2009-14 period) for each local authority area and uplifts these based on an area's median house price to earnings ratio. MOU2 then describes MOU1 and refers to acceptance of it on appeal [8/191 - 192] at [3.1-7]. It then describes "*significant*" changes to NPPF since MOU1, in light of introduction of the SM [8/192 - 193] at [4.1-10].

12. MOU2 repeats that it has been necessitated "*as a result of the significant shift in national policy since 2017*" ([8/193] at [5.2]), and sets out the following breakdown of the minimum number of homes to be planned for in accordance with the SM formula (at the date of approval of MOU2):

PCC:	241 dpa	23%
SRBC:	206 dpa	20%
CCC:	579 dpa	57%
Total:	1,026dpa	100%

MOU2 also explains that the 1,026 dpa figure is similar, in overall terms, to the 1,184 OAN resulting from the SHMA ([8/193] at [5.1-6]).

13. It does not appear that any of the matters at paragraphs 4 - 12 above are contentious.

14. MOU2 section 6 addresses the distribution of housing provision in Central Lancashire. This explains that the Councils have embarked upon a review of the development plan with an aspiration to have a new Central Lancashire Local Plan ("**CLLP**") in place by the end of 2022 (albeit the current Local Development Scheme now refers to 2023) [8/194 - 195]. Iceni have been commissioned to provide evidence to both inform the preparation of new planning policy, but also to inform a new interim arrangement as outlined in this MOU. They advise that the relevant number of homes needed in Central Lancashire is currently 1,026 dpa [8/194] at [6.1-5].

15. MOU2 then explains that various factors influencing the most appropriate distribution of housing need have been assessed, namely, population distribution, workforce distribution, jobs distribution, affordability, constraints, and urban capacity [8/194] at

[6.6]. Iceni's work demonstrates that applying the SM figure to each individual authority, as calculated, would be significantly at odds with the distribution of people, jobs and services [8/195] at [6.7]. It would also serve to undermine the key principles underpinning the Preston, South Ribble and Lancashire City Deal ("**the City Deal**"). The Councils have therefore aggregated the minimum annual LHN figure calculated using the SM and redistributed this to reflect the most sustainable pattern of development in the sub-region, as well as to align with City Deal growth aspirations in Preston and South Ribble specifically [8/194 - 195] at [6.6-11].

16. MOU2 concludes, recording the Councils' agreement to adopt the use of the SM formula to calculate the minimum number of homes needed in Central Lancashire (1,026 pa as at April 2019), and applying the recommended distribution of homes as follows:

PCC:	410 dpa	40%
SRBC:	334 dpa	33% (rounded)
CC:	282 dpa	28% (rounded)
Total:	1,026 dpa	100%

Provision is then made for: review; an annual Statement of Common Ground ("**SoCG**") (to update the actual minimum housing requirements until adoption of a new CLLP); co-operation in the performance and monitoring of MOU2; and monitoring of completions against requirements [8/196] at [8.1].

Approval of MOU2 [6/174 - 177]

17. CC considered and approved MOU2 on 25 February 2020, and SRBC did so on 26 February 2020. The Leader of PCC considered and approved MOU2 on 17 April 2020 in light of the DDR [6/176 - 177].

18. The DDR set out the background to the Decision, as summarised above. It referred additionally to the Chain House Lane decision, and recorded officers' agreement that the CLCS strategic policies are over five years old, that no formal review had taken place, and that their introduction of the SM formula is a significant change [7/181] at [3.15-17]. Although PCC was immediately able to demonstrate a 5YHLS in accordance with its *solus*[3] SM requirement, DDR recognised that review of MOU1 was the most

[3] Reference to "***solus* SM**" or "***solus* LHN**" in these Summary Grounds refers to the LHN resulting from the SM formula in respect of the individual local authority concerned prior to aggregation with that of other authorities and distribution between them

appropriate course to "*secure greater control over development that is not in accordance with the development plan*" and that three stage process (identifying each authority's individual need, aggregating these, and distributing that between the Councils) was in accordance with NPPF2 and the PPG [7/181] at [3.18-3.19]. A new CLLP is not likely to be in place before the end of 2023 [7/181] at [3.20]. It described the evidence-based approach adopted as according with Para. PPG2a-013 [7/182] at [3.27]. The DDR then reported the responses to consultation in respect of MOU2 [7/182 – 183] at [3.28-34].

19. Section 3 of DDR concluded:

> "*The revised MOU will enable the Central Lancashire authorities to have a clear and consistent approach to monitoring housing supply and will ensure each can protect its position individually as far as the five year supply of deliverable housing land is concerned. Given the approach to be adopted by the Central Lancashire authorities is one which is consistent with national planning policy and guidance, the protection of each local authority's housing land supply position will be particularly important in the context of the determination of planning applications for housing development and any subsequent appeals made against the refusal of planning permission under S78 of the Town and Country Planning Act 1990.*" [7/185] at [3.37]

20. DDR considered that use of the *solus* SM figures for each authority would be "*significantly at odds with the distribution of people, jobs and services. Furthermore, an approach such as this would serve to undermine the key principles underpinning the City Deal*" (see paragraph 15 above).

MOU2 Statement of Common Ground (May 2020)

21. The Councils have concluded an annual SoCG dated 13 May 2020 (5/170-173) pursuant to MOU2 [8.1(d)]. This sets out the Central Lancashire SM calculation as at April 2020, providing a *solus* and then distributed LHN requirement for each Council. The agreed total LHN and PCC figures of 1,010 & 404 dpa (5/173[2.5]) for April 2020 are consistent with the corresponding figures of 1,026 & 410 dpa within MOU2 (8/196 [7.1]). The minor difference between them is due to application of the most recent median work-based affordability ratios (published in March 2020) – in accordance with the SM - to the baseline housing growth figure over the next 10 years (see [5/172] at [2.1-2.2] for this

explanation). The agreed distribution is, of course, unchanged ([5/173] at [2.5] refers). Where not otherwise indicated, these Grounds refer to the figures in the MOU2 rather than SoCG, for ease of comparison with MOU2 itself. The SoCG is not under challenge in this claim.

LEGAL/POLICY/GUIDANCE FRAMEWORK

Determination of applications for planning permission (SFG [37] refers)

22. Pursuant to s. 70(2) TCPA 1990, "*in dealing with an application for planning permission … the authority shall have regard to – (a) the provisions of the development plan*[4]*, so far as material to the application … and (c) any other material considerations*".

23. Pursuant to s. 38(6) PCPA 2004, "*if regard is to be had to the development plan for the purposes of any determination to be made under the planning Acts*[5] *the determination must be made in accordance with the plan unless material considerations indicate otherwise*" [21/393].

24. By operation of s. 38(6), "*priority [is] to be given to the development plan in the determination of planning matters*"[6].

25. The NPPF is a "*material consideration*" for the purposes of both s. 70(2) TCPA 1990 and s. 38(6) PCPA 2004[7], Importantly, the NPPF "*cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme*": ibid.

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[4] Pursuant to s. 38(1) and (3)(b) PCPA 2004, "*the development plan*" in respect of the areas of the CLAs includes *inter alia* the CLCS.

[5] TCPA 1990 is one of "*the planning Acts*". Thus the determination of an application for planning permission is a "*determination to be made under the planning Acts*" for the purposes of s. 38(6) PCPA 2004

[6] Notably, "*the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are other material considerations which indicate that in the particular case the provisions of the plan should not be followed … it can be said that there is not a presumption that the development plan is to govern the decision on an application for planning permission*": see ***City of Edinburgh Council v [SoS] for Scotland*** [1997] 1 WLR 1447 *per* Lord Clyde at 1458B-F

[7] See: ***Hopkins Homes Ltd v [SoS] for Communities and Local Government*** [2017] UKSC 37; [2017] 1 WLR 1865 *per* Lord Carnwath at [21].

26. PPG is also a material consideration for the purposes of both s. 70(2) TCPA 1990 and s. 38(6) PCPA 2004, like the NPPF.

27. Where planning permission is refused, there is a right of appeal to the SoS pursuant to s. 78 TCPA 1990. Pursuant to s. 79(1) TCPA 1990[8], a planning appeal is heard *de novo* and the whole of the local planning authority's decision may be reviewed.

NPPF

28. NPPF2 para. 73 provides, so far as material that::

> *"Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their [LHN] need where the strategic policies are more than five years old. [fn 37]"* [17/341]

Footnote 37 provides: *"Unless these strategic policies have been reviewed and found not to require updating. Where [LHN] is used as the basis for assessing whether a five year supply of specific deliverable sites exists, it should be calculated using the [SM] set out in [PPG]."* [17/341]

29. Whether or not a local planning authority can demonstrate a five year housing land supply ("**5YHLS**") is significant because of the operation of NPPF2 paragraph 11 which materially provides:

> *"Plans and decisions should apply a presumption in favour of sustainable development …*
>
> *For decision-taking this means:*
>
> *c) approving development proposals that accord with an up-to-date development plan without delay; or*
>
> *d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date [fn7], granting permission unless:*

[8] *"the [SoS] may – (a) allow or dismiss the appeal, or (b) reverse or vary any part of the decision of the local planning authority (whether the appeal relates to that part of it or not), and may deal with the application as if it had been made to him in the first instance".*

> *i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or*
>
> *ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."* [17/339]

30. Footnote 7 provides, so far as material: *"This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or …"* [17/339]

PPG

31. The SM calculation is described in the section of PPG titled *"Housing and economic needs assessment"*. This section provides the only guidance within PPG on the calculation of the SM. The following three paragraphs are relevant, and all were issued on 20 February 2020 (following publication of NPPF2 on 19 February 2020).

32. Para. [2a-001] ***("What is housing need?")*** *explains that: "Housing need is an unconstrained assessment of the number of homes needed in an area. Assessing housing need is the first step in the process of deciding how many homes need to be planned for. It should be undertaken separately from assessing land availability, establishing a housing requirement figure and preparing policies to address this such as site allocations." (emphasis added)*

33. Para. [2a-002] ***("What is the [SM] for assessing [LHN]?") them explains that:*** *"[NPPF2] expects strategic policy-making authorities to follow the standard method in this guidance for assessing [LHN].The [SM] uses a formula to identify the minimum number of homes expected to be planned for, in a way which addresses projected household growth and historic under-supply. The [SM] set out below identifies a minimum annual housing need figure. It does not produce a housing requirement figure."*

34. Of most important to the current claim[9], Para. [2a-013] ***("How should [LHN] be calculated where plans cover more than one area?") provides:***

> *"[LHN] assessments may cover more than one area, in particular where strategic policies are being produced jointly, or where spatial development strategies are prepared by elected Mayors, or combined authorities with strategic policy-making powers.*

[9] Hence, presumably, it is set out both at SFG [26] & within the Claimant's chronology

> *In such cases the housing need for the defined area should at least be the sum of the [LHN] need for each local planning authority within the area. It will be for the relevant strategic policy-making authority to distribute the total housing requirement which is then arrived at across the plan area.*
>
> *Where a spatial development strategy has been published, local planning authorities should use the [LHN] figure in the spatial development strategy and should not seek to re-visit their [LHN] figure when preparing new strategic or non-strategic policies."* [18/346]

These grounds refer simply to NPPF1 & NPPF2 as current upon approval of MOU1 & MOU2 respectively. SFG [15] refers to an intervening iteration of NPPF dated 24 July 2018. That version introduced calculation of LHN in accordance with SM *in lieu* of assessment of housing need by reference to the FOAN. PPG Para. 2a-018-20180913 (enclosed with these Summary Grounds) was published in the context of that intervening iteration, and is in precisely the same terms as set out above. Guidance has therefore been consistent concerning the aggregation and distribution of LHN in the context of SM.

35. The SFG also refers to Paras. [61-010 to 012] from the section titled "*Housing supply and delivery*" (SFG [29] & [55.1]), where the point is made that MOU2 is not a SoCG. This is not, however, in dispute; and these paragraphs are therefore not considered further below.

36. Paras. [68-002 & 003] are referred to at SFG [17] and not subsequently, i.e. not in the grounds. These paragraphs are therefore also not considered further below.

Proper interpretation of planning policy (SFG [38-39] refer)

37. The summary of the law on the proper interpretation of planning policy at ***Bloor Homes East Midlands Ltd v. SSCLG*** [2014] EWHC 754 (Admin) at [19(4)] [27/406] is sufficient for this purpose. It requires objective interpretation of the language used read in its proper context. The same approach was applied to the interpretation of the NPPF in ***Hopkins Homes Ltd v SoS for Communities and Local Government*** [2017] UKSC 37; [2017] 1 WLR 1865 *per* Lord Carnwath at [22] – [26].

38. The approach to the interpretation of PPG is not on all fours with this approach, as described by Lieven J in ***Solo Retail Limited v Torridge District Council*** [2019] EWHC

489 (Admin) at [33] [28/409]. It will therefore rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in ***Tesco v Dundee*** [2012] UKSC 13; [2012] PTSR 983 applied to the Development Policy in issue there.

"Policy off" (SFG [46-47] refers)

39. ***Hunston Properties Ltd v. SoS Communities and Local Government*** [2013] EWCA Civ 1610, cited at SFG [46-7], concerned the assessment of FOAN in the context of NPPF1. Inspector Whitehead's observations cited from the Brindle Road decision [20/369 - 392], at SFG [20.1], are themselves dependant upon the application of ***Hunston***.

40. The assessment of FOAN in NPPF1 is now superceded by assessment of LHN in NPPF2 in accordance with the SM formula, which results in (formulaic) assessment of housing need that is not constrained. ***Hunston*** had no bearing on the distribution of FOAN between administrative areas forming a single HMA. This is apparent also from the judgment of Ouseley J in ***St Modwen Developments Ltd v SSCLG & East Riding of Yorkshire Council*** [2016] EWHC 968 (Admin) where he explained:

> *"74...I agree with the Inspector that [NPPF1] does not require housing needs to be assessed always and only by reference to the area of the development control authority.*
>
> *75. The first question is whether* ***Hunston*** *required the Inspector to reach a different decision. It did not.* ***Hunston*** *holds that, for whatever is the [HMA] being considered, it is the [FOAN] of that area which are to be considered.* ***Hunston*** *does not decide or even comment on the prior question of what [HMA] should be examined, nor does it address the issue of how the needs should be apportioned between the various parts of the [HMA] where it covers two local planning authorities' areas. [****Solihull MBC v Gallagher Estates Ltd*** *[2014] EWCA Civ 1610] makes the point that the phrase "as far as is consistent with the policy set out in [NPPF1]" cannot be construed so as to bring in to the assessment of the [FOAN] via the back door, what* ***Hunston*** *had excluded at the front door, namely policy constraints on which the local plan might impose on actually meeting those needs. But it does not deal with the area to be taken in the assessment of housing needs."* [74-75]

41. That last matter was the subject of consideration instead, in the context of NPPF1, in ***St Modwen*** itself and ***Oadby & Wigston Borough Council v SSCLG*** [2016] EWCA Civ 1040 (to both of which MOU1 [3.1-2] & [5.3-4] refer [9/199 - 201]).

42. ***St Modwen*** confirmed - in the context of NPPF1, an HMA comprising the areas of two authorities, and a strong track record of co-operation – that where the (unconstrained) FOAN had been properly assessed, it was a matter for the authorities to consider its distribution between them. A basis for apportionment had to be found. That was a matter for the authorities, and where the co-operation and agreement of the authorities came in provided the apportionment provides "*on whatever basis it is done*" for the FOAN to be met across the HMA (***St Modwen*** [79]).

43. The apportionment in ***Hunston*** was not the subject of a DPD, and the fact that this was so went to its weight rather than its lawful status (there is no reference to criticism of it as not subject to Strategic Environmental Assessment ("**SEA**"). It did, on the other hand, reflect a Joint Planning Statement which raised an issue concerning the historic loss of population from Hull, and the intention to stem that out-flow and increase housing growth in the Hull (as opposed to Strategic) Market Area to help support economic growth and meet housing needs. This Statement also had regard to the need to support the regeneration of Hull - "*a long term objective of both Councils*" (***St Modwen*** [72]), i.e. 'Policy on' matters.

44. In ***Oadby & Wigston,*** Lindblom LJ explained further as follows:

> "*53. In [the St Modwen] case the inspector and [SoS] were able to accept, as the appropriate basis for testing the sufficiency of the housing land supply, the agreed apportionment of housing needs between the two administrative areas in the [HMA] - given the authorities' long-standing and continuing co-operation in plan preparation. Ouseley J saw nothing unlawful in that conclusion.*"

45. It follows from ***St Modwen*** and ***Oadby & Wigston*** that the HMA was an appropriate basis for assessing the FOAN in the context of NPPF1 provided that there is agreement between the constituent local planning authorities of the HMA concerning how that need is to addressed between them. The implications of ***St Modwen*** and ***Oadby & Wigston*** for the proper interpretation of NPPF 2 and PPG Para. [2a-013] in particular are referred to under Ground 1 below.

<u>**Whether a document is a DPD**</u> (SFG [40-45] refer)

46. Pursuant to reg. 2 of the 2012 Regulations, "*local plan*" means "*any document of the description referred to in regulations 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) , and for the purposes*

of section 17(7)(a) of the Act these documents are prescribed as [DPDs]". Similarly, pursuant to reg. 6 of the 2012 Regulations "*Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(A) or (b) is a local plan*". Accordingly, whether or not a document, here MOU2, is a DPD for the purposes of the 2012 Regulations requires its consideration against reg. 5. See ***R. (Skipton Properties Limited) v Craven District Council*** [2017] EWHC 534 (Admin) *per* Jay J at [20] and [23].

47. Reg. 5 provides, so far as material to Ground 3:

> "*(1) For the purposes of section 17(7)(za) of the Act the documents which are to be prepared as local development documents are –*
>
> *(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following -*
>
> *(i) the development and use of land which the local planning authority wish to encourage during any specified period …*
>
> *(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission …*" [22/394]

48. The following principles are relevant to the application of reg. 5 in this case:

(a) Whether or not a document is a DPD is "*an application of fact to legal requirements and, as such, it is a matter where the Court has to make the judgment*" and the Court is not limited to reviewing a decision made by the local planning authority on ***Wednesbury*** grounds. However, "*in making that judgment, the Court must bear in mind that a local planning authority has … in good faith, characterised the document as [not being a DPD]*". Therefore the Court has "*to be cautious in concluding that the local planning authority has got that judgment wrong*". See: ***R. (Wakil) v London Borough of Hammersmith and Fulham*** [2012] EWHC 1411 (QB); [2013] 1 P. & C.R. 13 *per* Wilkie J at [81] – [82] [29/412 – 413].

(b) Reg. 5(1) is not concerned with documents containing statements that merely repeat the policies already contained in the adopted local plan or in another local development document by way of background or for the sake of clarity. See: ***R. (RWE Npower Renewables Limited) v Milton Keynes Borough Council***

[2013] EWHC 751 (Admin) *per* John Howell QC (sitting as a Deputy High Court Judge) at [67]

(c) Regulation 5(1)(a) fixes on "*statements*", not on policies. However, the noun "*statements*" can include "*policies*" as a matter of ordinary language, and any DPD properly so called must contain policies. It follows that any document falling within reg. 5(1)(a)(i) - (iv) must contain statements which constitute policies and may contain other statements, of a subordinate or explanatory nature, which are not policies. See ***Skipton*** at [79] [45/927].

(d) In assessing reg. 5(1)(a)(i), the court must look at the substance of the document as to whether the local planning authority wishes 'to encourage the development and use of land'. The court must also have regard to the subjective element in the verb "*wish*". See ***R. (Miller Homes Limited) v Leeds City Council*** [2014] EWHC 82 (Admin) *per* Stewart J at [26].

(e) Unlike reg. 5(1)(a)(i) which refers to "*encourage*", reg. 5(1)(a)(iv) is neutral and thus there is no need to find encouragement. See ***Skipton*** at [93(5)] [45/930].

(f) The "*and*" in reg. 5(1)(a)(iv) should be read disjunctively. See ***Skipton*** at [93(2)] [45/930].

(g) A document may fall within reg. 5(1)(a)(iv) even if it is not possible to identify a development management policy which is separate from the statements at issue if the document itself contains development management policies. See ***Skipton*** at [93(1)] [45/930].

Full Council or Executive Function (SFG [48] refers)

49. PCC takes no issue with SFG [48], and has nothing to add.

Alternative remedy

50. The Court of Appeal held in ***R. v. Epping and Harlow General Commissioners, Ex parte Goldstraw*** [1983] 3 All E.R. 257, at [262J that: "*it is a cardinal principle that, save in the most exceptional circumstances, [the judicial review] jurisdiction will not be exercised where other remedies were available and have not been used*". Further, it is an "*established principle that*

judicial review is a remedy of last resort": ***R (Burkett) v Hammersmith and Fulham London Borough Council*** [2002] UKHL 23; [2002] 1 WLR 1593 at [42].

51. The adequacy of an appeal pursuant to s. 78 TCPA 1990 as an alternative remedy was considered in ***R. (Taylor) v Maidstone BC*** [2004] EWHC 257 (Admin). An applicant for planning permission whose application had been refused applied for judicial review on the basis that the local planning authority's approach had been procedurally unfair. Sullivan J (as he then was) held that the applicant's right of appeal was an alternative remedy and refused the application for judicial review:

> *"If one pauses to ask what is the "real issue" in the present case the answer is obvious. It is not, as contended by … the claimant, whether there were any procedural irregularities in the decision-making process adopted by the Committee, but whether planning permission should be granted for the proposed [development]. Since planning permission has been refused, the claimant will have a full opportunity to explain before an Inspector appointed by the [SoS] why permission should be granted. [The claimant] submits that the Inspector will not in practice address the procedural complaints advanced on behalf of the claimant. That may well be true, save insofar as defects in the decision-making process may have led the Committee into making an error in its assessment of the planning merits of the proposal"* [12]

52. Further, Sullivan J held:

> *"But the question remains, accepting that there has been a breach of the [Council Code of Conduct], is judicial review an appropriate remedy for that procedural unfairness? Even if it is, should the court give relief as a matter of discretion, given not merely the availability of an appeal to the [SoS], but the fact that the claimant has availed himself of that opportunity? In my judgment these proceedings for judicial review are not appropriate. The procedures laid down in the Code are not an end in themselves. They are designed to ensure that so far as is possible the "correct" decision is made on the planning merits of the proposal under discussion.... Upon the basis that he should have been given a third opportunity to address the Committee, whilst he has been deprived of that opportunity, he will have a much fuller opportunity to deploy all the evidence and arguments as to why planning permission should be granted before an independent Inspector...*
>
> *I do not suggest that a breach of the Code is to be regarded lightly, but it has to be remembered that some of those affected by the Code will have no statutory right of appeal. If planning permission is granted, those aggrieved by the grant of planning permission will simply be able to contest procedural defects. They will not be able to raise the planning merits of the decision. By contrast, if planning permission is refused, the merits of the decision can be thoroughly examined on appeal and if and*

insofar as any procedural defect has contributed to an erroneous view of the planning merits, that can be exposed at the inquiry. If it is concluded that the procedural error has not led to a defect in the defendant's appraisal of the planning merits of the proposal, then it is difficult to see why relief should be granted in any event. The mere fact that there has been a breach of the Code does not lead to the inevitable conclusion that judicial review is the appropriate remedy, particularly if there is another right of appeal which is capable of dealing with the underlying issue, the planning merits of the proposal...." ([18], [20]; emphasis added)

SUBMISSIONS

Ground 1 – Proper interpretation of national planning policy and guidance

53. Having regard to NPPF2 [73], PCC's adopted strategic policy (CLCS Policy 4) is more than five years old. It has not been reviewed and found not to require updating. PCC must therefore assess its 5YHLS on the basis of its LHN. In accordance with footnote 37, "*[LHN] … should be calculated using the [SM] set out in [PPG]*". This is all common ground.

54. MOU2 represents the Councils' calculation of their LHN, using the SM out in PPG.

55. The essence of Ground 1, which Ground 2 repeats, is that the Claimant disagrees with the Councils' calculation of LHN based upon a process of aggregation of the minimum figure produced by the SM followed by distribution of that sum. That process is lawful for the following reasons.

56. NPPF2 [73] and [fn37] are expressed at a high level of generality. [fn37] directs the reader to PPG concerning how LHN is to be calculated using the SM. PPG Para. 2a-13 (paragraph 34 above) was issued alongside NPPF2 to explain the calculation of LHN where, according to its heading, "*plans cover more than one area*". The CLCS covers, and the CLLP which is in production is to cover, "*more than one area*"; and Para. 2a-013 is therefore engaged.

57. SFG [51] refers also to NPPF2 [27] & [212]; but these passages say nothing about the calculation of LHN and have no bearing on the distribution of LHN and the means by or basis upon which this might be undertaken.

58. The proper interpretation of Para. 2a-13 is straight-forward. The first sub-paragraph provides that *"[LHN] assessments may cover more than one area"*. This is particularly where, as here, *"strategic policies are being produced jointly"*. The second sub-paragraph explains that *"in such cases the housing need for the defined area should at least be the sum of the [LHN] for each local planning authority within the area"*. It clear from this that *"the defined area"* is the combined area, and that PPG envisages that the combined LHN, i.e. the sum of the product of the SM for each local planning authority within the defined area, may be distributed across *"the defined area"* provided this process does not distribute a figure less than *"the sum"*, i.e. that none is 'lost along the way'. The final sub-paragraph puts a stop to re-visiting LHN figures once a spatial development has been published - but envisages them being re-visited beforehand. MOU2 is consistent with Para. 2a-13 in all respects.

59. The Claimant's argument that PPG Para. 2a-13 is restricted to the preparation of local plans is erroneous. (1) Reference to *"in particular where strategic policies are being produced jointly"* does not itself impose a require that LHN assessments are to be made, let alone exclusively, as part of that process pending publication of a spatial development strategy. (2) That *"case"* is, moreover, an example only of where the LHN assessment may cover more than one area (Para. 2a-13 is not restrictive as to the circumstances in which it may apply, viz *"in particular"*). (3) The final sub-paragraph envisages that LHN figures including their distribution may be identified and re-visited pending publication of a spatial development strategy.

60. The Claimant's approach to PPG involves the reading-in or implication of terms restricting this paragraph to the plan-making process. This is itself impermissible because it fails to reflect that PPG is *"guidance not policy and it must therefore be considered by the Courts in that light. It will thus … rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in* ***Tesco v Dundee*** *applied to the Development Policy there in issue"* (see ***Solo Retail*** at paragraph 38 above). PPG is guidance which, by definition, cannot be exhaustive and requires application by the local planning authority (reviewable only on the basis of irrationality, see ***Tesco*** at [19]). It is clear that the aggregation and distribution in MOU2 is a rational application of the guidance in PPG.

61. Finally, MOU2 [4.7] refers to Para. 2a-13 in lieu of references within MOU1 to ***St Modwen*** and ***Oadby & Wigston***. It is apparent from its wording, however, that the effect

of Para. 2a-13 is to carry forward, and not reverse, the approach approved by both Ouseley J in *St Modwen* and the Court of Appeal (Black, Tomlinson & Lindblom LLJ) in ***Oadby & Wigston.*** That approach was, with respect, so clearly legally correct then and practically sensible (concerning the distribution of FOAN across a single HMA), that the clearest possible wording would now be required to displace or reverse it alongside the advent of SM and LHN. There is no such wording, and Para. 2a-13 articulates that approach instead. That approach is, moreover, entirely appropriate to Central Lancashire (an HMA comprising the areas of three authorities with a strong track record of co-operation). The Claimant does not, by contrast, advance any rationale or justification displacement of that approach and substitution by default of the figure that results from the SM formula in respect of each authority.

62. To conclude (referring back to Ground 1 as pleaded in bold type), PCC has not misinterpreted NPPF2 or PPG. Distribution of LHN otherwise than in accordance with the SM formula applied to each authority *solus* is not in any sense an immaterial consideration. CLCS Policy 4 and the *solus* SM are not exhaustive of the options for distribution of LHN (a submission that fails to acknowledge PPG Para. 2a-13 in its entirety). Ground 1 is unarguable.

Ground 2 – Erroneous advice in the March 2020 Report

63. Insofar as Ground 2 incorporates or is reliant upon Grounds 1 & 3, PCC's submissions are set out above and below.

64. Section 2 of the March 2020 Iceni Report, from which [2.19] (the only specific reference to that report cited under this ground) is drawn, does no more than set out a brief overview of the national planning context. It does not itself constitute or offer advice. [2.19] is, moreover, factually correct (the Claimant does not suggest otherwise). The Claimant and PCC are in agreement that MOU2 is not a SoCG (SFG [55.1] refers). The policy underlined at SFG [55] is therefore not applicable to it for that reason, and because MOU2 has not itself been adopted though or as part of "*the plan-making process*". NPPF2 and PPG do not require that the distribution of LHN should be undertaken solely either as part of a plan-making exercise or by means of a SoCG. Neither the DDR nor the Decision make reference to the March 2020 Iceni Report in any event.

65. There is no requirement that, as a matter of law, distribution of LHN should be "policy-off" as asserted (without authority) at SFG [55.2]. It is, to the contrary, rational in particular that MOU2 should have regard to the implications of failure to distribute for the City Deal, and to the capacity available to accommodate development without compromising planning constraints imposed by statutory development plan policy (viz the Green Belt). It would be surprising if it were otherwise.

66. To conclude (on the same basis as above), PCC did not rely upon an immaterial consideration, i.e. erroneous advice, as alleged because the passage referred to within the March 2020 Iceni Report was not advice (concerning consistency with national guidance or otherwise) and was accurate in any event. Ground 2 is also unarguable.

Ground 3 – Whether MOU2 is a DPD

67. Ground 3 is set out briefly and advances two alternative bases for considering that MOU2 is a DPD, i.e. that it falls within reg. 5(1)(a)(i) or (iv) of the 2012 Regulations.

68. SFG [60] refers to the contents of MOU2 at [6.11], [7.1-3] & [8.1] and it is assumed that these are the statements upon which the Claimant relies.

Reg 5(1)(a): general

69. Applications for planning permission are not assessed against anything in MOU2, bearing in mind that it sets out no development control criteria.

70. Whether or not a local planning authority can demonstrate a 5YHLS is also not itself a matter against which applications for planning permission are assessed. It is, rather, a (but not the only) trigger for the application of NPPF2 paragraph 11(d) (the tilted balance) in the determination of a planning application. Neither does MOU2 amount to or provide an assessment of the 5YHLS (and thus does not control the circumstances in which the titlted balance applies). Rather, MOU2 sets out instead the basis for identification of one input into assessment of the 5YHLS, i.e. LHN. The 5YHLS is then itself calculated separately from MOU2.

71. Calculation of LHN having regard to MOU2 does not therefore bear upon the determination of planning applications in any freestanding manner. It is, rather, only

linked to that determination through NPPF2 (via PPG) and the NPPF cannot, by definition, be other or more than a "material consideration", i.e. it is not a DPD (see above at 25). It follows that any statement in MOU2 cannot amount to a statement falling within reg. 5(1)(a) also because it can have no effect separately from and therefore carry greater statutory significance than the NPPF, which cannot itself fall within reg. 5(1)(a).

Reg 5(1)(a)(i): particular

72. The Claimant must show that the contents referred to contain statements regarding (1) "*the development and use of land*"; (2) "*which [PCC] wish to encourage*" (3) "*during any specified period*".

73. MOU2 [6.11] simply describes the process which the Council has undertaken in aggregating and redistributing the requirement figure derived from the SM. This is not a statement concerning the development and use of land and is devoid of encouragement ((1) & (2) above).

74. MOU2 [7.1] is introductory text to Table 2, [7.2] is explanatory text referring to the minimum LHN figures derived from the SM, and [7.3] simply refers to PPG. These are not statements concerning the development and use of land, much less ones which encourage its development and use ((1) & (2) above).

75. MOU2 [8.1] sets out the Councils' agreed approach. Parts (a) (agreement to apply the SM) and (b) (agreement to apply the recommended distribution) are not statements concerning the development and use of land, and do not encourage its development and use ((1) & (2) above). Parts (c), (d) & (e) (agreements to review the distribution, produce an annual SoCG, & co-operate) are administrative, unrelated to the development and use of land and also devoid of encouragement.

76. None of the statements relied upon are therefore statements within the scope of reg. 5(1)(a)(i).

Reg. 5(1)(a)(iv)

77. The Claimant must show that the contents referred to contain statements regarding (1) "*development management [or][10] site allocation policies*" which (2) "*are intended to guide the determination of applications for planning permission*".

78. MOU2 does not (1) identify (or itself contain[11]) "*development management [or] site allocation policies*", and is clearly separate from CLCS Policy 4, and therefore also does not contain statements which (2) "*are intended to guide the determination of applications for planning permission*".

79. None of the statements relied upon are therefore statements within the scope of reg. 5(1)(a)(iv).

Other

80. The Claimant's submission concerning the necessity for SEA (SFG [62]) is parasitic on MOU2 being a DPD, and fails because it is not. It is unnecessary to consider whether MOU2 is a plan or programme and within the descriptions at regs. 2 and 5(2) or (3) of the Environmental Assessment of Plans and Programmes Regulations 2004.

81. To conclude (on the same basis as above), MOU2 is not, upon its true characterisation and a proper application of the 2012 Regulations, a DPD. PCC did not therefore by-pass any relevant statutory requirements for its creation as such. Ground 3 is also unarguable.

Ground 4 – the Chain House Lane decision

82. The DDR noted the Chain House Lane Decision [7/181] at [3.15-18]. DDR [3.15] is an accurate narrative summary, descriptive only[12], and it is apparent from the remainder of DDR that officers did not then "*draw upon analysis of the housing land position in South*

[10] Disjunctive, see paragraph 48(f) above
[11] See above at paragraph 48(g).
[12] In particular the statement that the Inspector "*undertook a comprehensive analysis of the housing land supply position in South Ribble*" is obviously correct: see the Inspector's description of 5YHLS in South Ribble as a "*main issue*" at [6] and the extensive analysis at [9] [49]. The statement that "*the Inspector undertook this analysis mindful of the wider implications and consequences for the Central Lancashire authorities*" is accurate: see the discussion of the approach of PCC and CC to 5YHLS at [21] – [25] and references to the Councils' work at [29] – [35].

Ribble as having implications for [PCC]" (as SFG [66] suggests at least that they may have done).

83. DDR [3.16-17] of that decision letter identify three findings (strategic policies more than 5 years old, no formal review, introduction of SM a significant change) made by the Inspector. Officers agreed these findings for themselves. The Claimant confirms at SFG [65] that these are uncontroversial, and that *"if that were all that were taken from the decision then this ground can be withdrawn"*. It is apparent from the reasoning and conclusion at DDR [3.17] that that is so, i.e. the pre-condition is met. Ground 4 should therefore be deemed withdrawn. If not, it is unarguable because those findings with which officers agreed, are also agreed on behalf of the Claimant.

84. It is correct that Inspector Hunt reported on the fact that a review of MOU1 was underway, rather than suggesting that it ought to be reviewed [7/181] at [3.18]; but this does not give rise to any error of law (and the Claimant does not suggest that it does). The attack on DDR [3.18] is impermissibly forensic in respect of *"ought to review"*, and ignores the context of the surrounding paragraph. The Inspector said that *"the MOU itself requires review by September 2020; indeed a new version is currently undergoing consultation"* ([19/356] at [37]) and when read as a whole, DDR [3.18] accurately reflects this statement (dealing both with the need to review, and the fact that MOU1 was being reviewed). In any event, whether or not the Inspector considered MOU1 ought to be reviewed was immaterial given that the review had already commenced at the time of the Chain House Lane Decision. DDR [3.18] does not give rise to legitimate criticism, let alone an error of law.

85. The Claimant's submissions that the Chain House Lane decision was not a material consideration are misconceived. Argument that that decision *"contains illogical reasoning"* and *"legally unsound analysis of the five year land supply"* (with which PCC does not to any degree agree) amount to an impermissible collateral challenge to the lawfulness of that decision. The decision was valid at 17 April 2020 (notwithstanding that DDR acknowledged that it *"might be set aside"* [7/181] at [3.16]), and the Claimant acknowledges that its key content here (the three matters at paragraph 83 above) is not controversial. That content (or its substance) would remain valid, in any event, should that decision be quashed: see ***Davison v Elmbridge*** [2019] EWHC 1409; (Admin) [2020] 1 P. & C.R. 1 at [56].

86. To conclude once again (on the same basis as above), there was no requirement that PCC should have disregarded the Chain House Lane decision, and reference to it within DDR did not undermine the lawfulness of the Decision. Ground 4 is also unarguable.

Ground 5 – Compliance with PCC's Constitution

87. The Claimant asserts that the Decision was one which only PCC's Full Council could take because (1) it fell within art. 4.02 of PCC's Constitution (read together with art. 13.03); and/or (2) the Decision was a key decision within art. 13.03. Both arguments are incorrect for the following reasons.

88. First, art. 13.03 of PCC's Constitution reserves to PCC's Full Council "*Decision relating to the functions listed in Article 4.02*" [14/310]. In turn, art. 4.02 materially provides: "*Only the Council will exercise the following functions: … approving or adopting the policy framework…*" [14/308]. For these purposes art. 4.01 defines "*policy framework*" as follows:

> "*Policy Framework. The policy framework means the following plans and strategies*
>
> - *Community Strategy;*
> - *Documents Comprising the council's Budget and Priorities;*
> - *All [DPDs] pursuant to S15 of the Planning and Compulsory Purchase Order Act 2004;*
> - *Community Safety Plan;*
> - *Licensing Policy Statement; and*
> - *Gambling Policy Statement.*" [14/308]

89. It appears that the Claimant has overlooked art. 4.01: there is no reference to this provision in SFG in respect of this ground.

90. For the reasons above in respect of Ground 3, MOU2 is not a DPD. Accordingly, MOU2 does not fall within any of the bullet points in art. 4.01 and thus is not part of the "*policy framework*" for the purposes of arts. 4.02 and 13. Accordingly, the Decision was not reserved to the Full Council on this basis.

91. Secondly, the Claimant's argument that "*key decisions*" are reserved to the Full Council is incorrect. Art. 13 lists "*types of decision*" and within that gives two types: (1) decision reserved to Full Council (and refers to art. 4.02) and (2) key decisions [14/310]. Art. 13 does not say that key decisions are reserved to Full Council. Rather, the significance of a decision being a key decision is identified in art. 13: "*A decision taker may only make a key decision in accordance with the requirements of the Access to Information Procedure Rules set out in Part 3 of this Constitution*" [14/311]. The reference to "*decision taker*" is telling: such decisions are not reserved to Full Council. Accordingly, the Decision was not reserved to the Full Council on this basis.

92. To conclude finally on this ground (on that same basis), PCC's Constitution did not require approval of MOU2 by the Full Council, and the Decision, taken by the Leader, was not *ultra vires*. Ground 5 is also unarguable.

An alternative remedy

93. When his complaint is properly understood, the Claimant has an alternative remedy, namely an appeal to the SoS pursuant to s. 78 TCPA 1990.

94. It is apparent from SFG [4–7] that the Claimant's real grievance is that PCC refused his application for planning permission. He states at SFG [7]: "*The decision on the planning application will be appealed by the Claimant under section 78 of [TCPA] 1990 and the status of [MOU2] will be directly in issue within that appeal*" (emphasis added). It is clear beyond doubt that the Claimant intends to challenge the requirement figure from MOU2 in that appeal and PCC's conclusion that it is able to demonstrate a 5YHLS when that figure is applied.

95. Irrespective of the strength of the Claimant's arguments in this claim, PCC accepts that these are issues which can be properly considered on an appeal, since (a) MOU2 is a material consideration and not a DPD, and (b) PCC will need to demonstrate to the SoS that it has a 5YHLS. As part of his decision-making process, the SoS can consider both the requirement figure (whether PCC calculated its requirement correctly) and the extent of the supply (whether the sites upon which PCC rely are "*deliverable*"). This is entirely common and unremarkable.

96. PCC does not contend that MOU2 forms part of the development plan such as to attract the statutory force of s. 38(6) PCPA 2004, and the SoS is not bound by MOU2. It follows that the legitimacy of the approach within MOU2 can be considered entirely on appeal pursuant to s. 78 TCPA 1990, including the planning merits of the 'default' (SM) distribution of LHN for which the Claimant contends. Accordingly, this claim amounts to an attempt to litigate matters in the High Court which can, will, and are more appropriately – since they involve a considerable exercise of planning judgment on matters of fact and degree - considered on appeal, by an expert Inspector.

97. Judicial review is not being used here as *"a remedy of last resort"* (*per* ***Burkett***) and the Claimant has not endeavoured to demonstrate *"exceptional circumstances"* (per ***Goldstraw***). Moreover, as ***Taylor*** demonstrates, even where the allegation is that the local planning authority's approach is unlawful, this does not mean that an appeal pursuant to s. 78 TCPA 1990 is not an alternative remedy. Rather, the planning merits of PCC's approach to the calculation of 5YHLS can be considered and if and insofar as that approach is unlawful, such unlawfulness can be exposed on appeal.

98. Finally, insofar as it may be said that some matters in this claim (notably Grounds 3 and 5) are purely *"matters of law"*, this does not undermine the submissions above because: (1) the Councils do not say that MOU2 is a DPD (there can therefore be no prospect of the SoS being required to consider whether s. 38(6) PCPA 2004 applies, to the detriment of the Claimant); and (2) whether or not the Decision was in accordance with PCC's Constitution does not bear on whether the requirement figure in MOU2 is nevertheless correct and should applied by the SoS on appeal. Even if there were unlawfulness on these grounds, it is immaterial to the availability of an alternative remedy. The SoS can remedy any legal error in respect of Grounds 1, 2 & 4 by reaching his own lawful conclusion on the housing requirement figure to use for the calculation of 5YHLS – avoiding the false dichotomy between distribution in accordance with MOU2 v. *solus* SM/LHN without more.

Section 31 of the SCA 1981

99. Without prejudice to its submissions that this claim is unarguable, PCC submits that permission should be refused pursuant to s. 31(3C) and (3D) because it is highly likely that the outcome for the Claimant, i.e. the conclusion that PCC is able to demonstrate a

5YHLS, would not have been substantially different if the conduct complained of, i.e. MOU2's allegedly unlawful approval, had not occurred.

100. The Claimant seeks, by means of this claim, calculation of the 5YHLS on his appeal by reference to the figure of 241 dpa (which he contends is the correct application of the SM) in lieu of the figure of 410 dpa (derived from MOU2). 410 dpa is a substantially higher figure than 241 dpa. PCC's demonstration of a 5YHLS - the only purpose for identifying this requirement figure – would therefore be made substantially easier for it should the claim succeed, because its requirement would be (substantially) lower.[13]

101. It is therefore highly likely that the outcome for the Claimant, i.e. the conclusion that PCC is able to demonstrate a 5YHLS, would not be substantially different were his claim to succeed, because if the Council were to use the lower figure of 241 dpa as opposed to 410 dpa, it would continue to be able to demonstrate a 5YHLS (and to a larger degree, a position yet more adverse to the Claimant). The same applies to the Interested Parties identified by the Claimant.

CONCLUSION

102. PCC submits that permission to proceed with this claim should be refused because, for the reasons explained above, the grounds of challenge are unarguable, the Claimant has an alternative remedy and/or pursuant to s. 31(3C) and (3D) SCA 1981.

103. Further, PCC submits that the Claimant should be ordered to pay PCC's costs of this claim in the sum of £15,387, as set out in the schedule of costs filed with PCC's Acknowledgment of Service.

104. The Claimant's PAP letter of claim dated 21 May 2020 [33/427-34] left PCC – operating in difficult times - with just two full working days to respond ahead of the proposed reply date, and it therefore undertook to reply within 14 days (see its interim response at [33/435]). Mr Willis suggest that this stance was '*disingenuous*' in light of previous correspondence [4/46] at [8]. That correspondence, passing between December 2019 and February 2020, did not discharge the requirement for compliance with the PAP, and preceded key matters giving rise, for example, to Grounds 2, 4 & 5. Failure to afford

[13] See footnote 2 above: this point holds good even on the May 2020 figures which post date MOU2.

PCC the opportunity to avoid the costs incurred in filing its Acknowledgement of Service and Summary Grounds underlines its claim in respect of them.

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18 June 2020

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