RE: LAND TO THE SOUTH OF CHAIN HOUSE LANE, WHITESTAKE, SOUTH RIBBLE

LPA'S RESPONSE
TO THE APPELLANT'S APPLICATION FOR COSTS

---

1. This is the LPA's Response to the Appellant's Cost Application (ACA), dated 19th March 2021.

2. The Appellant has made a partial application for its costs from 15th March 2021, in respect of the costs of addressing RFR 1 at the Public Inquiry (see ACA 12).

3. The application relies on a single point. It is claimed that it was unreasonable (in the terms of the NPPG) for the LPA not to withdraw RFR 1, upon receipt of the Inspector's decision at Cardwell Farm (see especially ACA 7, 8, 10 and 11).

4. The LPA submit that the application is hopeless. It should not have been made. The LPA defend the application in full and submit that it should be summarily refused.

THE NATIONAL PLANNING PRACTICE GUIDANCE (NPPG)

5. This application is made with reference to the guidance contained in the NPPG (Appeals). The NPPG provides updated guidance on the award of costs and is designed to improve the efficiency and effectiveness of the

planning appeals system. All paragraph references are to the NPPG (Appeals) unless otherwise stated.

General Principles

6. In planning appeals, the parties involved normally meet their own expenses. However, the cost awards' regime seeks to increase the discipline of parties when taking action within the planning system, through financial consequences for those parties who have behaved unreasonably and have caused unnecessary or wasted expense in the process. The LPA do not accept their has been any "lack of discipline". On the contrary, their case has been carefully considered at each step of the Appeal process. Indeed, it was upheld in the first Appeal and should be upheld again.

7. The costs regime is aimed at ensuring as far as possible that (so far as relevant):[1]

- All those involved in the appeal process behave in an acceptable way and are encouraged to follow good practice **in the presentation of full and detailed evidence to support their case**;

- LPA'S properly exercise their development management responsibilities, **relying only on reasons for refusal which stand up to scrutiny on the planning merits of the case**.

Conditions for an Award

8. The Planning Inspector has an unfettered discretion on whether to make an award of costs. The Courts will not interfere except on public law grounds e.g. where the grant/refusal of an application is ***Wednesbury*** unreasonable.

[1] See para 028

9. Costs "may" be awarded where:[2]

- The party against whom the award is sought has acted unreasonably; and
- The unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process.

10. The word "unreasonable" is used in its ordinary meaning as established by the Courts in ***Manchester City Council v. SoSE & Mercury Communications Ltd*** [1998] JPL 774.[3] This application relates to the substance of the LPA's case on RFR 1 (rather than the procedure).[4]

11. Further explanation (together with non-exhaustive examples) of unreasonable behaviour by a LPA is set out in the NPPG. The following examples are relevant (see paragraph 49):

- **failure to produce evidence to substantiate each reason for refusal on appeal**;
- **persisting in objections to a scheme or elements of a scheme which the SoS or an Inspector has previously indicated to be acceptable**;
- **not determining similar cases in a consistent manner**

12. The key test will be whether evidence is produced on appeal which provides **a respectable basis** for the authority's stance, in the light of a ***R v. SSE ex parte North Norfolk DC*** [1994] 2 PLR 78.

---

[2] Paragraph 31

[3] See para 32

[4] *ibid*

THE LPA'S SUBMISSIONS

16. The essence of the Appellant's claim is that the LPA has failed to produce on appeal evidence which provides a respectable basis for RFR 1, contrary to the NPPG and ***R v. SSE ex parte North Norfolk DC*** [1994] 2 PLR 78.

17. The LPA submit it is unanswerable that they have produced a respectable basis for RFR 1. Indeed, the Appeal should be dismissed on the basis of RFR 1 (as well as RFR 2).

18. The central issue in RFR 1, as BP expressly conceded, is whether Policy 4(a) is out of date for the purposes of the 5YHLS calculation. **That requires the exercise of a planning judgment**. In the light of the case law (see ***Bloor Homes***), that proposition is unanswerably correct.

19. **Accordingly, the central dispute concerns the exercise of a planning judgment on whether Policy 4(a) is out of date**. That is a matter on which different judgments may reasonably reached by different people. Indeed, that cannot reasonably be argued because it is *precisely* what Dove J held in ***Wainhomes Ltd v SoS HCLG and South Ribble BC*** [2020] EWHC 2294 (Admin) [CD 7.1], in a passage which is expressly relied upon by both parties:

> *45. … I am satisfied that the conclusion the Inspector reached in paragraph 37(iii), that there had been a significant change pursuant to the PPG arising from the introduction of the standard method,* ***was a planning judgment reasonably open to her based upon a correct interpretation of the PPG (albeit other conclusions might reasonably be reached by other Inspectors), and therefore she was entitled to conclude that Core Strategy Policy 4(a) was out of date****.*

20. At the heart of RFR 1, there is a difference of planning judgment on whether Policy 4(a) is out of date. That is a disagreement on which different conclusions might reasonably be reached. There is, therefore, no conceivable basis for an adverse award of costs. It is noteworthy that the Appellant has failed (again) to draw the Inspector's attention to relevant parts of the ***Wainhomes*** judgment, when it knew (or ought to know) that it is relevant to this application.

21. In particular, the LPA submit (in light of the above):

(i) It is not unreasonable for the LPA to exercise a different planning judgment to the Cardwell Farm Inspector on the issue of whether Policy 4(a) is out of date;

(ii) It is not unreasonable for the Inspector (in this case) to exercise a different planning judgment to the Cardwell Farm Inspector on this issue;

(iii) It is not, therefore, even arguably unreasonable for the LPA to seek to persuade this Inspector to reach a different planning judgment to the Cardwell Farm Inspector, <u>especially</u> given the multiple flaws in that decision, which is to be challenged by Preston City Council in the Planning Court;

(iv) Indeed, the Appellant is seeking to persuade the Inspector to reach a different planning judgment to the first Inspector. The first Decision Letter remains a material consideration (***R (Davison) v Elmbridge*** [2019] EWHC 1409 (Admin)). It is to that issue which para 45 of the judgment is directed i.e. a subsequent Inspector can <u>reasonably</u> reach a different planning judgment to a previous Inspector.

22. The Appellant does not suggest that there was <u>not</u> a respectable basis for RFR 1. Rather, the sole issue is that the LPA's position became

unreasonable once the Cardwell Farm DL was issued i.e. at that point there was no longer any respectable basis for RFR 1. For the reasons set out above, that simply cannot succeed. The decision maker can reach a different planning judgment on whether Policy 4(a) is out of date (as Dove J has expressly held). This application must, therefore, fail on this basis alone.

The Key Point

23. BP agreed there were two key issues under RFR 1:

(i) Whether the Inspector can lawfully consider whether policy 4 is out of date, given the terms of NPPF 73 and fn 37?

(ii) If he can consider it: whether policy 4 is out of date, as a matter of planning judgment?

24. The Appellant has sought to resile from the concession but it was clear and unqualified. It is also correct. The Appellant's case is contained in point (i). The LPA's case is point (ii). The concession merely confirms this unanswerable proposition.

25. Point (i) is not in fact addressed or answered by the Cardwell Farm Inspector. The LPA's case is simple: even if there has been a review, the Inspector can lawfully exercise a planning judgment to consider whether Policy 4(a) remains up to date, as a result of material changes in circumstances since 2017, including the change to national policy and the consequent changes on the ground. That proposition is entirely consistent with Lindblom J in ***Bloor Homes***.

26. It is also consistent with Dove J at paras 42 and 43. In particular:

Moreover, ***the question of whether or not any change in circumstances is***

significant is one which has to be taken on the basis of not only the salient facts of the case, but also other national and local planning policy considerations which may be involved. In short, in my view, the language of the PPG and its proper interpretation did not constrain the Inspector and preclude her from reaching the conclusion that she did, namely that the significant difference between the housing requirement in Core Strategy Policy 4(a) and that generated by the standard method was capable of amounting to a significant change rendering Core Strategy Policy 4(a) out of date.

27. The LPA strongly submit that the Inspector is lawfully entitled to exercise a planning judgment on whether Policy 4(a) is out of date, as a result of changes in circumstance since the review. It is submitted that this is an unanswerable and elementary planning principle. It is not precluded by the wording of NPPF 73 and fn 37 as BP expressly conceded (the LPA's notes on this are clear).

28. For the purposes of this application, the LPA therefore submit:

    (i) This is *not* an issue addressed (transparently or at all) by the Cardwell Farm Inspector, who provides no answer to key point (i);

    (ii Accordingly, there is a contested legal proposition at the heart of point (i).

29. The LPA submits that the Appellant's legal submissions are flawed. The LPA has not even arguably misunderstood the judgment of Dove J (ACA 10). Reading paras 42, 43 and 45 together, it is clear that a planning judgment can be made and is (in fact) required in this case given the LPA's evidence. This cannot reasonably be contested by the Appellant.

There is, therefore, a respectable (if not unanswerable) basis for the LPA's RFR 1.

30. The second point concerns a planning judgment on which reasonable disagreement may occur. This cannot be grounds for a cost application.

Previous Decisions

31. The Application is made on the basis that it was unreasonable for the LPA to continue with RFR 1, once the Cardwell Farm decision was issued. That proposition fails to establish and (then) engage with the relevant legal principles concerning previous decisions.

32. This appeal (as a matter of law) falls to be determined on its own merits (not in accordance with the decision in Cardwell Farm). Applying s.38(6), the appeal falls to be determined in accordance with the Development Plan, unless material considerations indicate otherwise. A previous decision letter is capable of being a material consideration because of the principle of consistency of administrative decision-making. However, the Cardwell Farm decision is emphatically not binding on this Inspector. There is no rule that like cases must be decided alike. On the contrary, a Planning Inspector must always exercise his/her own judgment and is therefore free to disagree with the planning judgment of another. However, an Inspector ought to give reasons for departing with a previous decision, unless it concerns a matter of judgment, in which case you can simply say: "*I disagree*" (see ***North Wiltshire DC v SoSE*** [1992] 65 P&CR 34). That is also the basis of Dove J's decision (*ibid*).

33. Indeed, the Cardwell Farm Inspector has disagreed with the Pear Tree Lane Inspector and the First Chain House Lane Inspector as a matter of judgment and has provided reasons for doing so. It is not even arguably unreasonable for the LPA to invite this Inspector to do the same.

34. It follows that the Cardwell Farm does not conclusively address the issue of whether Policy 4(a) is out of date, such that it is unreasonable for the LPA to present a respectable case on it. The Appellant's application is legally flawed. It should fail on this point alone.

The Cardwell Farm DL (AD 1)

35. For the avoidance of doubt, it is not accepted that: "*A major part of the Council's case has been the importance of determining cases on a consistent basis*".[5] That is a forensic mischaracterisation of the LPA's case, which has been made to support its misplaced allegation of unreasonable conduct. Rather, the major part of the LPA's case has been that a planning judgment must be exercised on the issue of whether Policy 4(a) is out of date as a matter of planning judgment.

36. The LPA drew the Inspector's attention to this Appeal in its written evidence, as it is bound to do. The LPA drew the Inspector's attention to it, when it was published (see AD 1). This is not (even arguably) unreasonable conduct – quite the opposite.

37. Thereafter, the LPA has presented evidence to explain why it (reasonably) disagrees with the decision in Cardwell Farm and has provided reasons for this disagreement (per ***Wainhomes*** and ***North Wilts DC*** *supra*). This has been addressed in the Closing Submission of the LPA (see paragraph 95 - 100). In essence:

    (i) SRBC did not appear at that Inquiry and did not provide evidence/submissions to it;

[5] ACA 8

(ii) The Cardwell Farm Inquiry evidence is not before this Inspector. It can be provided if necessary but such evidence is materially different. The submissions were also materially different;

(iv) There are significant flaws in the decision letter. Having identified that Preston CC argued that there had been a significant change since the review in 2017 (DL 32), the Inspector fails to answer it and fails to reach a planning judgment on whether Policy 4(a) is out of date as a result. Reading the decision letter fairly and in full, that judgment is not addressed;

(v) The Decision Letter is to be challenged by PCC. SRBC agree that it is legally flawed because *inter alia* (a) it fails to address whether there has been a significant change in circumstances which renders Policy 4(a) out of date; and/or (ii) whilst it addresses Ground 1 of ***Wainhomes***, it fails to take Ground 3 into account and/or address it (see DL 38, 40 and 41);

(vi) If, which is not accepted, such issues have been addressed and taken into consideration, the reasoning is unlawfully absent. It is simply not clear what conclusion was reached on this issue and why. It is therefore unlawful;

(vii) Rather, the Inspector asks (DL 33) and answers (DL 33-40) the *different* question of whether there has been a review of a review. There is, however, no statutory/policy or guidance requirement for their to be a review of a review before a planning judgment can be exercised on whether Policy 4(a) is out of date. Policies are routinely concluded to be out of date without "a robust process" or a review of a review (DL 33). All that is required is a planning judgment (on which different conclusions can reasonably be reached).

(viii) The Cardwell Farm DL does not, therefore, provide a complete answer to the LPA's evidence and submissions at this Inquiry. On

the contrary it is deeply flawed and reasons have been provided why it should be followed.

38. Therefore, the LPA has provided a "respectable basis" for reaching a different planning judgment on the issue of whether Policy 4(a) is out of date. In all the circumstances, that is not arguably unreasonable. On the contrary, the LPA has set out robustly and persuasively why this Appeal should fail on RFR 1.

The LPA's Second Review

39. Further or alternatively, since the Pear Tree Lane Inquiry and in the light of evidence at this Inquiry and Cardwell Farm, the LPA has undertaken a further review and concluded that the 5 year supply should be calculated using the LHN (see AD 10). In XX, **BP conceded the position was materially different**. This Appellant is bound by the answers of its professional witness and the concession was express and clear. The LPA's notes are all consistent on this point. Further, the concession is unanswerably correct. As a matter of fact, PCC have not undertaken such a second review. The decision required in this Appeal *is* materially different. It is not, therefore, close to unreasonable to defend RFR 1. This alone is a complete answer to the cost application.

40. Of course, the Appellant disputes that this is a "review". However, that makes the LPA's point for it. This is a matter on which there is contested professional evidence and on which another planning judgment is required. The LPA's position (see Closing at para 106) is correct. It is not arguably unreasonable.

41. Indeed, the application (again) departs from its own evidence. BP conceded that the decision had been robust as a process (cf ACA 10). He nonetheless argued that it was not a review. That concession cannot

reasonably be disputed as it was read back to the witness. Again, the LPA's notes are all consistent on that point. Given that it is common ground that there are no formal requirements (no formal process requirements), the concession is the only rational position to adopt. The remaining issue is whether it constitutes a "review". Again, given the absence of requirements for the review, the Appellant cannot reasonably argue that it wasn't a "robust process" because the LPA have such a wide measure of discretion in what constitutes its review.

42. In essence, the LPA exercised a planning judgment on the process of the review (see AD 10 10, 22 and 23). There are no procedural requirements for that planning judgment, save that it must be proportionate (which is not contested). There has unanswerably been a review. That is abundantly clear from AD 10. The Appellant has sought to pick flaws in the review. However, even at their highest they do not demonstrate that the decision cannot reasonably be characterised as a review. On that basis, consent should be refused on RFR 1. Further, the Appellant's evidence therefore comes nowhere near demonstrating that the LPA's reliance on the second review is unreasonable because of the Cardwell Farm DL. That is an unreasonable evidential *non-sequitur*.

43. Finally, Cardwell Farm is based on a claimed lack of clarity over what basis should found a 5YHLS calculation, as an alternative to MOU 2 (DL 39). There is no such ambiguity in SRBC. The position is different.

CONCLUSION

44. In all the circumstances, this application is hopeless and must fail.

GILES CANNOCK QC

Kings Chambers

24th March 2021