Calderdale Local Plan

Response to the Representations on behalf of Clifton Village Neighbourhood Forum dated 17th January 2022.

Preamble

1. On the 11th January 2022 at Stage 4 of the Examination of the Calderdale Local Plan the Clifton Village Neighbourhood Forum ("CVNF") referred to an Opinion of Philip Robson, Counsel to the CVNF Forum, that had concluded that the LPA's proposal for the funding of the infrastructure to support Garden Suburbs was unlawful. The opportunity was afforded to CVNF to put written legal submissions to the Examination.

2. The written legal submissions were provided on the 17th January 2022 unsupported by any Opinion by Counsel.

3. The CVNF maintain that, it was only during preparation for the recent Stage 4 hearing session they became aware of relevant case law on whether money can be recovered through a roof tax in respect of the cost of infrastructure which has already been built and paid for by the public sector.

4. In particular, the case of CVNF is predicated on the basis that the "roof tax" proposed by the Council and promoters is a means of retrospectively recovering costs of funding site specific infrastructure. This will have been forward funded by the public sector and delivered in advance of the Garden Suburbs coming forward, in an expectation cost are repaid as development proceeds.

5. Specifically, CVNF consider the proposed roof tax to be unlawful as it comprises a de facto local land tax which falls outside of the power contained in Section 106.

Statutory Provisions

6. The vehicle for securing the necessary finance in order to deliver the necessary infrastructure to accommodate the timely and appropriate delivery of the Garden Suburbs will be through the utilisation of section 106 Planning Obligations. The provisions state:

"(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A to 106C as "a planning obligation"), enforceable to the extent mentioned in subsection (3)—

(a) restricting the development or use of the land in any specified way;

(b) requiring specified operations or activities to be carried out in, on, under or over the land;

(c) requiring the land to be used in any specified way; or

(d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically.

(1A) …

(2) A planning obligation may—

(a) be unconditional or subject to conditions;

(b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and

(c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.

(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—

(a) against the person entering into the obligation; and

(b) against any person deriving title from that person.

(4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.

(5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.

(9) A planning obligation may not be entered into except by an instrument executed as a deed which—

(a) states that the obligation is a planning obligation for the purposes of this section;

(aa)if the obligation is a development consent obligation, contains a statement to that effect;

(b) identifies the land in which the person entering into the obligation is interested;

(c) identifies the person entering into the obligation and states what his interest in the land is; and

(d) identifies the local planning authority by whom the obligation is enforceable …

(10) A copy of any such instrument shall be given to the authority so identified ….

(11) A planning obligation shall be a local land charge and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge.

7. As will be readily apparent the provisions:

(a) are not required to be elided with a planning application. Consequently, a landowner can bind his landownership with a planning obligation whether there is a planning application submitted or not.

(b) specifically, allow for sums of money to be paid to an LPA.

Legal Framework

8. The CVNF submission refers to the Supreme Court decision in respect of the Scottish Case ***Aberdeen City and Shire Strategic Development Planning Authority v. Elsick Development Company Limited*** [2017] UKSC 66. A full copy of the decision is attached. It concerned the use of Section 75 Agreements (the Scottish equivalent of section 106 Agreements) and Pooling Arrangements to fund the infrastructure required in areas which were to accommodate major new development.

9. It is important to note that there are some differences in how the legislation in the two jurisdictions was framed. Section 75 of Planning (Scotland) Act 2006 provides:

> *"(1) A person may, in respect of land in the district of a planning authority -*
>
> *(a) by agreement with that authority, or*
>
> *(b) unilaterally,*
>
> *enter into an obligation (referred to in this section and in sections 75A to 75C as a 'planning obligation') restricting or regulating the development or use of the land, either permanently or during such period as may be specified in the instrument by which the obligation is entered into (referred to in this section and in those sections as the 'relevant instrument')*
>
> *(2) Without prejudice to the generality of subsection (1), the reference in that subsection to restricting or regulating the development or use of land includes - (a) requiring operations or activities specified in the relevant instrument to be carried out in, on, under or over the land, or (b) requiring the land to be used in a way so specified.*
>
> *(3) A planning obligation may –*
>
> *(b) require the payment –*
>
> *(i) of a specified amount or an amount determined in accordance with the relevant instrument. …"*

10. The facts were that Aberdeen identified a number of strategic growth areas. It also identified a number of significant improvements to transport infrastructure that could only be funded if it was able to secure contributions from the increase in land values associated with development. Aberdeen consulted on and adopted Supplementary Guidance that established a fund to deliver these infrastructure improvements to which the developments within the growth areas were required to contribute.

11. Elsick owned land on which they proposed to construct 4000 new homes and was one of those developers within a growth area. They had objected to the Fund on the grounds that it was contrary to the Scottish guidance and in particular, that they were being required to make contributions to highway infrastructure despite Aberdeen's own evidence was that the Elsick proposal had no, or at its highest, a *de minimis*, effect on the road network.

12. Elsick challenged the requirement to contribute where they succeeded at first instance. Aberdeen appealed and the decision was upheld by the Supreme Court.

13. In a judgment which considered the tests for validity of conditions, section 106 agreements and the connection between the two, Lord Hodge began by affirming that conditions must meet three tests: the condition(s) must be imposed for a planning purpose, must fairy and reasonably relate to the permitted development, and must not be unreasonable. This aspect of the judgment does not bear upon the issues concerning this case.

14. Lord Hodge addressing the difference between conditions and section 106 obligations, observed that, unlike conditions, the validity of planning obligations did not depend on their relationship to a particular permission: it was possible to enter into a section 75 obligation even if there was no planning application. At paragraph 35 Lord Hodge stated:

> *"Planning obligations are most commonly required in the context of an application for planning permission, but they are not confined to such circumstances and are available as a means of keeping land free from any development. It is not surprising therefore that there is no general legal requirement that there be a relationship to a permitted development."*

15. He observed:

> *"The legality of a planning obligation depends on whether it restricts or regulates the use of land"*

16. Beyond this, the only tests for the legality of a planning obligation were that it must be for a planning purpose, and not be Wednesbury unreasonable. Lord Hodge at paragraph 37 referring to the English jurisprudence in ***Tesco Stores v Secretary of State*** [1995] 1 WLR 759 added:

> *"Lord Hoffmann (779D) summarised the case thus: "the only tests for the validity of a planning obligation outside the express terms of section 106 [of the 1990 Act] are that it must be for a planning purpose and not Wednesbury*

unreasonable". Thus beyond the restrictions implicit in the words of the section there are only the constraints of administrative law, which requires the planning authority to exercise its power to seek a planning obligation for a planning purpose: its exercise solely for a purpose unrelated to land use planning would be an abuse of power. Similarly, if a local planning authority acts unreasonably in the Wednesbury sense in requiring the undertaking of a planning obligation, the obligation may be reduced (nullified). Other rules of administrative law, such as the requirement to take into account all relevant considerations, also apply."

17. In the circumstances, the Supreme Court upheld the view that the Supplementary Guidance in ***Aberdeen*** involved contributions that were fixed at a sum per unit that was not related to the impact of a particular development on the transport network and therefore did not meet the criterion in the Circular that contributions had to be fairly related in scale and kind.

18. Contrary to the suggestion in the CVNF submission the Supreme Court did not find that pooling arrangements were inherently unlawful even where the contributing development was prospective. Lord Hodge at paragraph 41:

"… a planning authority may contract for the payment of financial contributions towards, for example, educational facilities, healthcare facilities, sewerage or waste and re-cycling: requiring a development to contribute to, or meet, its own external costs in terms of infrastructure involves regulating the development of the land which is burdened by the obligation. The financial contribution can be applied towards infrastructure necessitated by the cumulative effects of various developments, so long as the land which is subject to the planning obligation contributes to that cumulative effect and thereby creates a sufficient relationship between the obligation in question and the land so that one can fairly speak of the obligation as regulating the development of the land."

19. A "Roof Tax" or "Pooling Scheme" will be lawful where there is a clear link between the development and the infrastructure which is to be funded and where the LPA can demonstrate that the contribution required of any particular developer is based on the impact of that development is likely to have.

Calderdale Council's Approach

20. CC84a is a Note to the Inspector concerning the delivery of the infrastructure to deliver the Garden Suburbs. Paragraph 3.0 states:

> *"… the key items of infrastructure need to be delivered by 2025, whereas the housing is delivered at a steadier rate across the life of the Plan. As such, over £50m worth of infrastructure needs to be funded early in the life of the Local Plan, which necessitates the use of prudential borrowing to ensure that it is delivered by the necessary dates. The Council will recover this investment through financial contributions from developers".*

21. Specifically, it states that there is a need to establish an approach to secure financial contributions that reconciles a number of requirements including:

> *"Developers making a fair and proportionate contribution to the cost of infrastructure"*

22. There is not an indiscriminate tax per residential unit to address Borough wide infrastructure needs. On the contrary, the infrastructure needs of the two Garden Suburbs have been carefully assessed. The contributions sought are self-evidently linked to the scale of impact of the development because Calderdale Council is setting different rates for the two Garden Suburbs. Thus, the contributions as calculated reflect the fact that they impact existing infrastructure differently with consequences for the cost of addressing the impact of such development.

23. At paragraph 42.0 the Council recognises that:

> *"Prudential borrowing is necessary in order to deliver the development identified in the Local Plan in a manner that is aligned with the provision of essential infrastructure. This is because the financial receipts from the roof-tax are expected to be received throughout the life of the Plan (i.e. to 2032/33) in line with the housing trajectory, whilst the education and transport infrastructure needs to be provided by 2025".*

24. CC84a anticipates[1] that the charge can be expected at a per dwelling rate that is paid in instalments for a given phase of the development.

25. An obvious point to make is this is far from a unique or even an unusual circumstance. Significant development projects frequently need infrastructure investment "up front" that is often facilitated by the public sector with provision made for recoupment of the expenditure.

26. There are numerous examples of Garden Suburb developments or sustainable Urban Extensions being promoted thorough out the country that require some element of "up-front" public funding. In this respect the reference to East Leeds Orbital Route was, and is, an example of such an approach in principle.

27. The "clear differences"[2] that CVNF references between the East Leeds Orbital Route and Calderdale Council's approach are said to be that the East Leeds Orbital Route is a strategic new dual carriageway that is needed to address existing congestion whilst also enabling growth east of Leeds. CVNF seek to contrast this asserting that the Calderdale approach includes various pieces of smaller site-specific infrastructure (roads, schools. health centre, etc.) which are typically enabled by a developer as part of the delivery of a major site. The point serves only to support the case of Calderdale Council because:

> (a) it is clearly the case that the infrastructure initially to be funded by Calderdale Council is attributable to the requirements of the development. There is not any significant element of infrastructure that is necessitated in whole or part to existing conditions. Therefore, developers of the Garden Suburbs sites are not being asked to contribute to the remediation of an existing problem; and

[1] Paragraph 11.0 of CC84a

[2] Paragraph 1.15 of CVNF Submission

(b) the Council has made it abundantly clear that the contributions that will be sought will be *"fair and proportionate"* i.e. objectively fair in the sense that any payment reflects the cost of the necessary infrastructure and proportionate in the sense that the contributions that are secured reflect causation between the development and the need for the infrastructure – thereby ensuring the delivery of infrastructure is fairly and reasonably related to the development.

28. The additional concern articulated by CVNF relating to the recovery of Council expenditure from development when the infrastructure has already been delivered[3] betrays a misunderstanding of the mechanisms likely to be engaged in this case. The bringing forward of large projects such as the Garden Suburbs proposals in the Calderdale Plan is an iterative process. The Council has made it clear in CC84a that the up-front infrastructure costs will be financed by borrowing and it has already commissioned Bentley Project Management to carry out a cashflow exercise to model the amount and points in time that the Council would need to draw down loans and the adjustments that would need to be made to the "roof-tax" figures to account for the borrowing costs[4]. The Council will seek to ensure that it has the revenue stream to repay the debt without placing an additional burden on public finances.

29. There is an implicit suggestion in the CVNF that the Council would deliver the "up-front" infrastructure without any commitment whatsoever from the landowners/developers to bring forward the residential and other development. If that is the CVNF case then it is patently absurd.

30. The Council will act on appropriate legal and accountancy advice. It can be expected that prior to securing the borrowing needed the Council will have in place a legally binding commitment from the landowners and developers to bringing forward the Garden Suburbs developments in a timely manner in accordance with anticipated phasing programme together with the obligation to make infrastructure repayments. The commitment can be expected to be secured through a section 106 obligation. The

[3] Paragraph 1.22 of the CVNF Submission
[4] Paragraph 35.0 CC84a

commitment required by Calderdale Council does not require there to be a planning application before the LPA as is clear from the legislation and judicial authority cited above.

31. The Council is already drawing upon the practical experience of other public authorities to inform its detailed approach in this regard.

32. Importantly, it forms no part of the submissions on behalf of CVNF to suggest that it would be unlawful or contrary to policy for an LPA to facilitate the infrastructure to deliver much needed development and make provision for the recovery of public expenditure that would be enforceable.

33. Once it is appreciated that there is not any basis for CVNF to object to the principle of Calderdale Council facilitating the "up-front" provision of necessary infrastructure and providing for the future recovery of its expenditure as development progresses there is no proper basis to conclude the Local Plan is in any way flawed or unsound. Both primary legislation at section 106 of the 1990 Act and judicial authority support the case made by Calderdale Council.

Conclusion

34. The CVNF Submission does not establish that there is no link between the development and the need for the infrastructure identified; does not establish that funding is unlawful or inappropriate and does not acknowledge that the infrastructure identified is necessary to make the development acceptable in planning terms, directly related to the development and is fairly and reasonably related in scale and kind to the development.

35. The proposal by Calderdale Council is lawful where there is a clear link between the development and the infrastructure which is to be funded and where the LPA can demonstrate that the contribution required of any particular developer is based on the impact of that development is likely to have.

36. There is a clear mechanism that the Council can deploy that would enable it to fund infrastructure and recover from those that benefit from its provision the costs of doing so.

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