

## **Representations on behalf of Clifton Village Neighbourhood Forum**

### **Calderdale Local Plan**

### **Matter of the proposed Garden Suburb Roof Tax**

**17<sup>th</sup> January 2022**

#### **Background**

- 1.1 At Stage 4 of the Examination of the emerging Calderdale Local Plan on 11<sup>th</sup> January 2022, Clifton Village Neighbourhood Forum ('the Forum') made a brief submission on the matter of a 'roof tax' advanced by Calderdale Council ('CC') and promoters of local plan sites LP1451 and LP1463 (the 'Woodhouse' and 'Thornhills' Garden Suburbs).
- 1.2 The 'roof tax' is proposed by CC and promoters as the as a means of retrospectively recovering costs of funding site specific infrastructure, which will have been forward funded by the public sector and subsequently delivered in advance of the Garden Suburbs coming forward, in an expectation cost are repaid as development proceeds.
- 1.3 The Forum 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 (s106) of the Town & Country Planning 1990 ('the Act) (or for that matter the 2008 Act). Taxation to enable local or national government to recover the cost of monies which have been expended would require primary legislation, whereas s106 of the Act can only be used for purposes within the scope of the legislative intention, not as a means to raise a local land tax. If the roof tax falls away, the Garden Suburbs are unviable based on CC's own evidence as CC is already having to fund the sites.
- 1.4 At the request of the Inspector, this note provides greater detail on those submissions made at the Stage 4 Hearing session.

#### **Timing of the submissions**

- 1.5 The 'roof tax' was introduced by CC part way through the hearings process (i.e., it did not form part of the submission plan) and was first discussed at Stage 2. However, it was only during preparation for the recent Stage 4 hearing session the Forum 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. The Forum raised these additional concerns at the first opportunity during the Hearings (i.e., Stage 4 session of 17<sup>th</sup> January 2022).

#### **The proposed 'roof tax'**

- 1.6 As the Inspector is aware, CC's position in respect of infrastructure requirements has changed significantly between the Regulation 22 (Submission) version of the Local Plan and the plan which is now being considered at the Stage 4 Hearings. For example, and with relevance to; the Brighouse area, the proposed Garden Suburbs, infrastructure funding, and the proposed roof tax, CC has removed a strategic link road between the proposed Garden Suburbs and replaced it with a series of minor interventions and

now advances a case that infrastructure will be delivered up front, funded by CC prudential borrowing and recovered retrospectively over time through the roof tax.

- 1.7 The roof tax was first introduced, and set out, in CC document HS8.1 (paragraph 8.48 to 8.56 in particular) and cross referred in HS15.1 (paragraphs 15.3 and 15.4). This was in August 2020, some 18 months after Regulation 22 submission.
- 1.8 For the reasons explained later in this submission, in order to understand why CC's roof tax approach is unlawful, it is critical to first understand the sequencing of infrastructure delivery and hypothetical delivery of houses on the Garden Suburb.
- 1.9 Focussing on transport infrastructure as an example; HS8.1 outlines (at paragraph 8.40) the infrastructure which CC believes is required for the proposed Garden Suburbs. HS8.1 paragraph 8.41 then confirms CC's intention for CC to deliver various pieces of infrastructure required (either in full or in part) for the Garden Suburbs by 2025, i.e., in advance of delivery of development at the Garden Suburbs (see trajectory at document CC125). Indeed, CC confirmed this in the Stage 3 Hearings by asserting A641 Corridor improvements (proposed to be funded by CC, with cost recovery later from Garden Suburbs roof tax) would be delivered in advance of the Garden Suburbs.
- 1.10 HS8.1 (at paragraph 1.8 of Appendix 5) confirms:

*'... the Council is now working up the principles of a roof tax mechanism (in lieu of CIL) which will be underpinned by a series of publicly funded prudential loans, utilised up front, to pay for the developer contributions towards the total cost of the A641 works and education obligations. These loans would then be repaid proportionately by site developers across south east Calderdale (including the garden suburbs) via a roof tax mechanism once houses start to come on stream.'*

- 1.11 HS15.1 (at paragraph 3.7 of Appendix 6 (Statement of Common Ground)), reaffirms the timing of the roof tax, stating:

*'... The cost of infrastructure delivery borne through prudential borrowing will be recouped through a roof tax approach...' (NJL Consulting underlining)*

- 1.12 Clearly, therefore, the intention is for CC to pay for and deliver infrastructure up front and then recoup the cost through later Garden Suburb delivery.

### **Relevance of the Leeds City Council roof tax**

- 1.13 CC has relied heavily on Leeds City Council's ('LCC') use of a roof tax and inferred that the LCC example shows a roof tax in Calderdale would be lawful and reasonable. For context, LCC has an adopted East Leeds Supplementary Planning Document SPD ('the ELSPD') which links recover of costs of the East Leeds Orbital Route ('ELOR') to various stages of development of adjacent allocations by means of a Roof Tax.
- 1.14 The Forum is not aware if LCC sought legal advice in adopting the SPD.

- 1.15 However, there are clear differences between ELSPD infrastructure (i.e., the ELOR) and infrastructure funded by the CC roof tax (i.e., site specific infrastructure). The ELOR is a strategic new dual carriageway which is needed to address existing congestion whilst also enabling growth east of Leeds. By comparison, the CC roof tax would include 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.
- 1.16 Furthermore, the ELSPD appears to direct the cost of parts of the ELOR to relevant phases of the adjacent development. The scope of any Section 106 obligation entered in to as a result of the ELSPD is not clear but there appears to have been a clear intention to ensure the delivery of infrastructure was fairly and reasonably related to the development which generated the requirement, linked in some prospective manner by a planning obligation. It is emphatically not the simple 'repayment of public funds which have already been paid out' of the type that CC appear to propose.
- 1.17 In any event, the fact LCC has adopted a roof tax does not mean that such an approach is lawful.

### **Lawfulness of a roof tax**

- 1.18 The use of a roof tax has been considered in the Supreme Court (*Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Limited* [2017] UKSC 66). The Supreme Court concluded a generalised roof tax cannot be lawfully imposed, and financial contributions must be linked to the impact a development will have and not by roof count. The requirements of a planning obligation in this regard are clearly set out in Regulation 122(2) of the Community Infrastructure Levy Regulations (2010) ('the CIL Regulations).
- 1.19 Furthermore, levying general taxation, can only be done through an Act passed through Parliament, a fundamental aspect of the British constitutional arrangement. The proposed roof tax, which requires compulsory contributions without any link to a particular development's land use impact, is a local tax with no statutory basis for its imposition.
- 1.20 Evidently, the Community Infrastructure Levy process provides a lawful means of securing floorspace based contributions specifically linked to the provision of infrastructure within the area in question. However, CC has confirmed that it is not advocating the use of CIL to fund Garden Suburb infrastructure. It should be noted that the Planning Act (2008) was introduced specifically as a means to ensure that monies could be levied from development which did not otherwise meet regulation 122(2) but was to be paid on wider infrastructure proposals. If s106 had already provided such a power, then that part of the 2008 Act would have been unnecessary as a tariff-based approach could have been introduced in any event. The fact that Parliament considered this part of the 2008 Act was needed highlights that s106 of the 1990 Act does not provide a wide power to levy a local land tax.
- 1.21 The CIL Regulations (at Regulation 122(2)), govern can be sought from a s106 obligation linked to a planning permission. The Regulations are clear that to be a reason for grant of planning permission, a planning obligation must be:

- (a) necessary to make the development acceptable in planning terms;
- (b) directly related to the development; and
- (c) fairly and reasonably related in scale and kind to the development.

- 1.22 It follows that if infrastructure has already been delivered (as it would under the terms of the CC roof tax) then contributions from subsequent developments cannot be “necessary” to make the development acceptable in planning terms as infrastructure needed to enable the development will already be in place. Then, if infrastructure is already in place, it is not directly related to the development. These matters are assessed in the aforementioned Supreme Court case.
- 1.23 It is noted that no legal opinion which provides a robust view on the legality of this highly unorthodox approach has been provided by CC to justify its approach. The Inspector is specifically invited to request such an opinion before proceeding further, and the Forum specifically would suggest that other parties should be afforded the opportunity to respond to such advice.

### **Implications of the roof tax being dropped**

- 1.24 Evidently, if the roof tax were omitted there are two potential funding outcomes:
- 1. CC left to fund infrastructure for a private development site; or
  - 2. Garden Suburb promoters required to deliver all necessary infrastructure without the benefit of CC early funding.
- 1.25 It is highly questionable whether CC could be seen to be publicly funding a private development site (Option 1), nor would they have the financial capacity to do so. In which case, Option 2 (private developer funding) is more likely.
- 1.26 We have shown Option 2 is unviable. CC's evidence (at HS8.1 and 15.1) is clear that early CC funding of these sites is needed in order to secure timely delivery of essential infrastructure. It stands to reason if funding were not in place the infrastructure would be delayed or, alternatively, the developer would be required to commit to significant early expenditure. Developer funded infrastructure has been shown to be unviable.
- 1.27 It is crucial to note that CC's Garden Suburb viability evidence (HS8.1 Appendix 5; and CC101) does not assess development cashflow. This is critical as there is no Garden Suburbs 'master developer' in place, and the role of a master developer in this instance would be, in part, to co-ordinate and deliver early infrastructure to ready such a challenging development site. Without a master developer there is no evidence that private funding for early infrastructure would be available.
- 1.28 Based on the evidence available, the only rational conclusion is the Garden Suburbs would be unviable without CC prudentially borrowing to deliver early essential infrastructure, which is the very reason why CC amended it's approach 18 months after submission to propose a roof tax.