

17 SEPTEMBER 2013

AGENDA ITEM 13

DACORUM LOCAL PLANNING FRAMEWORK: ADOPTION OF CORE STRATEGY

Notice of Possible Legal Challenge under Section 113 of the Planning Act 2004

1. The possibility of challenge is identified in Section 8 of the Cabinet Report.
2. A letter was received on 13 September from Paul Winter, Solicitor, acting for Grand Union Investments Limited (GUI) (see Appendix). Having sought Queen Counsel's opinion, Paul Winter asserts that the Core Strategy is flawed and unsound, and requests the Council to refuse to adopt. He states that he has advised his clients (GUI) that they should issue proceedings to challenge the Core Strategy (if it is adopted).
3. The grounds of challenge are explained in the attached letter. In essence they are that:
 - The Council has not followed the policies of the National Planning Policy Framework (NPPF) in relation to housing requirements (i.e. meeting full objectively assessed need and providing sufficient sites to do this) and Green Belt release (i.e. promoting sustainable growth and providing safeguarded land beyond the plan period); taken with the need to plan for a 15 year plan period, these are serious defects.
 - The Inspector has similarly failed. Furthermore, he has not sufficiently addressed the legal requirements relating to soundness or other shortcomings raised during the examination.
 - Partial review of an unsound plan cannot make it sound. The Council cannot therefore rationally adopt the Core Strategy.
 - Strategic Environmental Assessment did not consider the reasonable alternative of meeting full objectively assessed [housing] needs.
4. The Council took advice from Queen's Counsel (Simon Bird QC) in respect of similar points raised earlier in the year. This was reported to Cabinet on 26 April 2013. Key points to highlight from Counsel's opinion are as follows:
 - It is important *to have regard* to the policies of the NPPF as a whole.
 - The Inspector must balance all relevant factors – for example, the lack of an up-to-date policy framework (if the Core Strategy is not adopted), the extent of the land supply and the extent of a perceived shortfall: plan making is not all about housing delivery.
 - Whether it is appropriate to allow a later review to occur is a matter of planning judgement.
 - It is wrong to characterise partial review of the Core Strategy as effectively allowing an unsound plan to be adopted. The Inspector's conclusions that weaknesses in the plan, which could not be tolerated for the full plan period, can be remedied as part of an appropriate strategy for an early partial review is a lawful approach to meeting objectively assessed need in full.
 - Whether it is appropriate to allow a later review and revision of Green Belt boundaries to occur is a matter of judgement.

5. With regard to point 4 in the pre-action letter, the Council's sustainability consultant (C4S) assessed the option of 538 dwellings pa at Pre-Submission stage within the Sustainability Report. This is the level of full objectively assessed needs which is taken from paragraph 24 of the Inspector's Report. 13,450 is a Government (DCLG) projection.

Conclusion

6. Rob Jameson (external Solicitor) who advised the Council throughout the Core Strategy process has been consulted on the pre-action letter received and is satisfied that the points raised in the letter have been previously considered and modifications made to the Core Strategy to address the concerns. Counsel, Simon Bird QC, has also considered the letter and is satisfied that his previous opinion addresses the key issues which have been summarised above.

Accordingly, officers are satisfied that:

- a) The approach of a partial review rectifying weaknesses in the core strategy is a reasonable and balanced approach.
 - b) The Inspector's Report and conclusions are reasoned and reach an appropriate balance on planning grounds.
7. There is nothing unlawful in the Inspector's approach and his approach is not contrary to current guidance, statute or case law.
 8. Therefore, whilst the risk of challenge must clearly be noted and it will ultimately be for the Courts to decide the lawfulness of the Council's approach if it is challenged, no change to the recommendation is suggested and the recommendation to Council to adopt the Core Strategy stands.

Appendix: Letter from Paul Winter (text)

Paul Winter & Co

Solicitor

Fleet House
8-12 New Bridge Street
London
EC4V 6AL
Tel:
Mobile:
E-mail:

020 7936 2433
07836 773279
paulwinter@paulwinterandco.com

Daniel Zammit
The Chief Executive
Dacorum Borough Council
Civic Centre
Marlowes
Hemel Hempstead
HP1 1HH

BY EMAIL AND BY POST

13 September 2013

Dear Sir

Dacorum Core Strategy Development Plan Document – informal notice of intention to make a claim

This letter is being sent to you on the basis of advice received from Christopher Katkowski QC (with which I fully concur) that the proposed adoption of the Dacorum Core Strategy DPD will be unlawful and that there are strong grounds for judicial challenge under section 113 of the Planning and Compulsory Purchase Act 2004.

I have advised my clients, Grand Union Investments Limited (GUI) that if the Council proceeds in accordance with the recommendation set out in the report due to be considered at the Cabinet Meeting on 17th September 2013, they should issue proceedings to challenge the lawfulness of the Core Strategy.

Whilst a formal pre-action protocol letter is not required in this case, we have been advised to provide a brief outline of the basis on which my client's claim will be made in order that the Council can have an opportunity to consider these matters carefully before they decide whether or not they should adopt what GUI are advised is a seriously flawed and unsound document, despite the modifications proposed and conclusions contained in the Inspector's report dated 9th July 2013.

In brief summary, the grounds of challenge will include the following:

- 1) That the Core Strategy substantially fails to accord with NPPF policies in relation to:

a. identifying the full objectively assessed housing needs of the district (NPPF paragraphs 47 & 159) and requiring LPAs to plan positively for the development and infrastructure required in the area to meet the objectives, principles and policies of the NPPF and to allocate sites to promote development and bring forward new sites where necessary ((NPPF paragraph 157);

b. establishing through local plans Green Belt boundaries that will have regard to their intended permanence in the long term and taking account of the need to promote sustainable patterns of development, including identifying safeguarded land where appropriate and ensuring consistency with the Local Plan strategy for meeting identified requirements for sustainable development (NPPF paragraphs 83 - 85);

c. the crucial need for Local Plans to plan positively for the development and infrastructure needed and to be drawn up over an appropriate time scale, preferably a 15-year time horizon – the Core Strategy initially purported to provide for a substantially longer period (and was submitted and assessed on that basis), but the serious defects identified in the statutory examination process have, by virtue of MM28, seriously compromised the ability of the Core Strategy to provide clear and effective guidance due to the need for a “partial review” to remedy these fundamental shortcomings in the submitted Core Strategy which means effectively that the time horizon of the Core Strategy (if adopted) will be approximately 4 years only;

d. the criteria for soundness (paragraph 182) are clear and it is clear that the Core Strategy is unsound by reference to those criteria. Whilst the inspector (Inspector’s report paragraph 28) appears to reduce the importance of the NPPF as “*guidance not statute*” the criteria in paragraph 182 have considerable statutory importance under section 20 of the 2004 Act; I it will be contended that the effect of his recommendation in paragraph 79 and the recommendation in the Cabinet report published 10 September 2013 will be unlawful on the basis that they will clearly amount to adoption of an unsound development plan document.

2) Section 19(2) requires the LPA to have regard to these policies and the findings of the inspector (See for example, Inspector’s report paragraphs 11 – 26; 33 – 34 and 78) indicate that the LPA manifestly failed in that statutory duty;

3) Whilst the inspector found (Inspector’s report paragraph 77) that the Core Strategy has met all legal requirements, he does not specifically analyse these requirements or address shortcomings that were raised during the examination process. He also concludes (paragraph 79) that the recommended changes (main modifications) will satisfy the requirements for Section 20(5) of the 2004 Act and meet the criteria for soundness in the NPPF. It will be contended that this conclusion is wrong as a matter of law and that the LPA, properly advised, cannot rationally adopt the plan on that basis and in particular on the basis of the amendment set out in MM28 because that amendment cannot have the effect of converting a fundamentally unsound and non- legally compliant development plan document into a sound one.

4) Furthermore, it will be contended on behalf of GUI that the strategic environmental assessment of the Core Strategy was defective and did not fulfil the requirements of the SEA Directive or the SEA Regulations and that, by virtue of regulation 8 of the SEA regulations, the LPA is not entitled to adopt the plan. Regulation 12(2)(b) of the SEA regulations require the SEA to identify describe and evaluate the likely significant effects on the environment of *“reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme”*. The inspector’s findings indicate that the alternative of providing for the full housing needs of the district was a reasonable alternative and was arguably the most reasonable alternative in the circumstances of this case. It is plain that the LPA failed to undertake a legally compliant SEA process in relation to this option. This defect is integral to the Core Strategy and is not capable of being remedied by MM28 or the other modifications recommended by the examining inspector.

In the light of the above, we strongly urge the Council to refuse to adopt the Core

Strategy. Yours faithfully,

Paul Winter

Paul Winter

c.c. James Doe
Richard Blackburn Laura
Wood Richard Blackburn