

## **CARDWELL FARM,**

### **BARTON**

#### **ADVICE**

1. I am instructed to advise Wainhomes (North West) Limited (“Wainhomes”) in respect of the implications of the recent judgment in the case of *Wainhomes (North-West) Limited v SSCLG* (“the Judicial Review”) for the application for planning permission for residential development at Cardwell Farm (“the Planning Application”).
2. The Planning Application is a resubmission of an earlier application to Preston City Council (“the Council”) which was originally considered by the Council in October 2019. At that time the Council’s planning committee, in accordance with its officer recommendation, resolved to grant planning permission for the proposal subject to completion of a section 106 obligation. The Council changed its position in February 2020 as a result of an appeal decision in respect of land at Chain House Lane in South Ribble (“the Chain House Lane decision”). That appeal decision was the subject of the challenge in the Judicial Review.
3. The Chain House Lane decision arose out of an appeal by Wainhomes against refusal of planning permission for residential development. The Chain House Lane site was located within an area of Safeguarded Land which was subject to policy G3 in the South Ribble Local Plan and the proposal was refused planning permission on the ground that it would be contrary to policy G3. At the appeal it was argued on behalf of Wainhomes that the “tilted balance” under NPPF paragraph 11 applied because (a) South Ribble Council was unable to demonstrate a 5 year housing land supply applying the adopted development plan figures, and (b) if Local Housing Need were to be used instead of the development plan for calculating 5 year housing land supply this would result in such a significant change in the distribution of housing within the housing market area as to render policy G3 in the development plan out of date. The adopted

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<sup>1</sup> [2020] EWHC 2294 (Admin)

development policy setting out the housing requirement for South Ribble is Policy 4 of the Central Lancashire Core Strategy.

4. NPPF paragraph 11(d) provides that where the development plan policies most important for determining an application are out-of-date planning permission should be granted unless footnote 6 policies provide a clear reason for refusing the development or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole (what is commonly termed the “tilted balance”). There was no issue with respect footnote 6 policies in the Chain House Lane decision. Whether the tilted balance applied depended upon whether the most important determining policies were out of date. Footnote 7 provides one particular situation where policies will be found out of date namely in housing cases where the local planning authority cannot demonstrate a 5 year supply of housing land. It is important to note that this is merely one situation where the relevant policies will be found to be out of date<sup>2</sup>.
5. In summary the net effect of NPPF para 73 as qualified by footnote 37 is that in calculating five year housing land supply the requirement set out in adopted strategic policies should be used (a) if the policies are less than five years old, or (b) where more than five years old the policies have been reviewed and found not to require updating: in any other cases the requirement is to be calculated using Local Housing Need. CS Policy 4 is more than five years old and the question therefore arose as to whether the policy had been reviewed. It is important to note that this policy applies to the three Central Lancashire Local Planning Authorities of which the Council is one together with South Ribble and Chorley. It applies to all three authorities because they make up one housing market area (the Central Lancashire housing market area). The policy distributes housing between the three authority areas in a particular ratio.
6. At the outset of the Chain House Lane inquiry South Ribble Council’s case was that there had been no review of CS Policy 4 despite the existence of a Memorandum of Understanding in 2017 between the Central Lancashire Local Planning Authorities. South Ribble Council was unable to maintain that position during the course of the inquiry and its witnesses conceded that there had been a review in 2017. In the light of that concession South Ribble Council sought to argue that even if there had been a

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<sup>2</sup> This point was recently emphasised by the Court of Appeal in *Oxton Farm v Harrogate BC* [2020] EWCA Civ 805 para 33

review it could no longer be relied upon because there had been significant changes in national policy. South Ribble Council conceded at the inquiry that it could not demonstrate a 5 year supply of housing land if CS Policy 4 was used for calculating the requirement.

7. Despite South Ribble Council's concessions at the inquiry the Inspector concluded that there had not been a review of the relevant strategic housing policies for the purposes of paragraph 73 and footnote 37 of the NPPF. This conclusion was challenged by Wainhomes as ground 1 in the Judicial Review. Dove J found that the Inspector erred in her conclusion that there had not been a review.
8. The Inspector further concluded that there had been a significant change in circumstances since the events relied upon as constituting a review. This finding was challenged by Wainhomes as ground 3 in the Judicial Review. On this ground Dove J found that although other Inspectors might reasonably have come to a different judgement, it was reasonably open to the Inspector "*to conclude that Core Strategy Policy 4(a) was out of date*"<sup>3</sup>. The challenge was accordingly unsuccessful on ground 3, but it is important to note that this was on the basis that CS Policy 4 was out of date.
9. Wainhomes' position at the Chain House Lane inquiry was that if Local Housing Need were used for calculating housing requirement this would lead to a significantly different redistribution of housing throughout the Central Lancashire housing market area which would render South Ribble Local Plan policy G3 out of date. At the inquiry the Council's witness ultimately conceded that use of Local Housing Need would result in a radical redistribution of the housing requirement which would render policy G3 out of date<sup>4</sup> and it was conceded by South Ribble Council that if Local Housing Need were used that would render policy G3 out of date and trigger the application of the tilted balance<sup>5</sup>. Despite this common position the Inspector found that use of Local Housing Need did not have this result. This finding was challenged as ground 5 in the Judicial Review. The Secretary of State conceded from the outset that the Inspector erred in this respect and did not seek to contest the Judicial Review. Although South Ribble Council sought to defend the Inspector's decision it was ultimately unsuccessful. Dove J found that the Inspector's reasons failed to provide any answer

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<sup>3</sup> Judgment paragraph 45

<sup>4</sup> Judgment paragraph 35

<sup>5</sup> Judgment paragraph 17

to the point and that her reliance on a future exercise of policy making being advanced by the Central Lancashire authorities “reinforced the point that Local Plan Policy G3 was in fact out of date”<sup>6</sup>.

10. The reference to a future exercise of policy making is a reference to a proposal by the Central Lancashire Local Planning Authorities to enter into a new Memorandum of Understanding which would aggregate the figures derived from application of Local Housing Need in the three authorities but then redistribute this aggregated figure amongst the three local authority areas in a proportion which would be significantly different to that which would arise from simply applying Local Housing Need in each individual authority. The Council and the other Central Lancashire Local Planning Authorities subsequently entered into a new Memorandum of Understanding along these lines in April 2020. This action is subject to challenge by judicial review which is yet to be determined.
11. The new Memorandum of Understanding was considered in a recent appeal decision in Chorley (“the Pear Tree Lane decision”<sup>7</sup>). In that decision letter it is referred to as “MOU2”. In that appeal the parties agreed not to use the Core Strategy/2017 Memorandum of Understanding figure to calculate the 5 year requirement. Chorley Council sought to use the figure derived from MOU2 whereas the appellants relied upon the Local Housing Need figure for Chorley. The Inspector concluded that limited weight could be given to MOU2<sup>8</sup> and accordingly given the manner in which the case had been argued he applied Local Housing Need to calculate the housing requirement in Chorley. Importantly the Inspector in the Pear Tree Lane decision also concluded that CS Policy 4 was (a) out of date and (b) one of the most important determining policies for the appeal (despite the application of Local Housing Need), and that accordingly the tilted balance applied<sup>9</sup>. The Inspector also went on to find that settlement boundaries and policies constraining development beyond such boundaries which derived from an out of date housing requirement would in themselves be out of date. In the case of the Pear Tree Lane decision the relevant policy in the Chorley Local Plan was policy BNE3<sup>10</sup>.

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<sup>6</sup> Judgment paragraph 37

<sup>7</sup> Appeal Ref:APP/D2320/W/20/3247136

<sup>8</sup> See paragraphs 32 & 34

<sup>9</sup> See paragraphs 44 - 46

<sup>10</sup> See paragraph 49 & 50

12. The Council's February 13<sup>th</sup> 2020 committee report in respect of the original application on Cardwell Farm addressed the change of position from the October 2019 report at paragraph 3. It explained that in October 2019 the Council could not demonstrate a 5 year housing land supply and that accordingly applying NPPF paragraph 11(d) the policies most important for determining the planning application (namely CS Policies 1 and 4 and Local Plan Policies EN1 and AD1(b)) were out of date and that applying the tilted balance the adverse impacts of granting planning permission would not significantly and demonstrably outweigh the benefits of the proposed development. The report then draws attention to the Chain House Lane decision and suggests that in the light of that decision the relevant policies should no longer be considered out of date. It is clear from that report that there is no issue with respect to NPPF footnote 6 policies and that in the event of those identified policies being out of date the tilted balance would apply.
13. In light of the judgment in the Judicial Review the Council cannot rely upon the Chain House Lane decision and the tilted balance will have to be applied by the Council in determining the Planning Application.
14. The tilted balance applies where the development plan policies most important for determining an application are out-of-date. In this case the Council has identified the policies most important for determining the application as CS Policies 1 and 4 and Local Plan Policies EN1 and AD1(b). Importantly the Council has correctly recognised that in the event of CS Policy 4 being out of date and/or the absence of a 5 year housing land supply those other policies are out of date.
15. If CS Policy 4 is applied the Council is unable to demonstrate a 5 year housing land supply and accordingly the tilted balance is triggered by NPPF footnote 7. In accordance with NPPF paragraph 73 and footnote 37 CS Policy 4 is to be applied if there was a review of the policy. Ground 1 of the Judicial Review establishes that the Chain House Lane Inspector erred in her finding that there had been no review. Importantly the Judicial Review also establishes that the attempt to avoid use of CS Policy 4 leads to the conclusion that the policy is out of date in any event (Judicial Review ground 3) (it can be noted a similar conclusion was reached in the Pear Tree Lane decision<sup>11</sup>).

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<sup>11</sup> Paragraphs 42-45

16. In the circumstances the tilted balance will apply whichever approach the Council seeks to take. If the Council reconsiders the matter correctly and recognises that there was a review of CS Policy 4 in 2017 the housing requirement figure will be derived from CS Policy 4 and the Council will be unable to identify a five year housing land supply, triggering application of the tilted balance. If the Council seeks to avoid use of CS Policy 4 it will lead to the conclusion that the housing requirement, and by association the settlement boundaries, are derived from the obsolete North West RSS and out-of-date household projections rendering CS Policy 4 and Local Plan Policy EN1 out of date, triggering application of the tilted balance.
17. Even if the above points were ignored it is clear from the Judicial Review and the Pear Tree Lane decision that any use of Local Housing Need in place of CS Policy 4 for calculating the housing requirement will lead to application of the tilted balance. Use of Local Housing Need results in a radical redistribution of housing land and requirement throughout Central Lancashire compared to that provided for in CS Policy 4 which renders out of date the settlement boundaries and associated policies which were drawn up in reliance upon CS Policy 4, thus rendering the relevant policies out date. This is established in ground 5 of the Judicial Review and was recognised in the Pear Tree Lane decision. Indeed in entering into MOU2 the Council effectively conceded this point.
18. In the circumstances in the light of the judgment in the Judicial Review, the tilted balance is triggered in this case irrespective of whether one applies CS Policy 4 or Local Housing Need to calculate the housing land requirement.
19. If I can be of any further assistance to my instructing accessor, he should not hesitate to contact me.

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Vincent Fraser QC  
2<sup>nd</sup> September 2020