

**IN THE HIGH COURT OF JUSTICE**

**ADMINISTRATIVE DIVISION**

**PLANNING COURT – LEEDS DIVISION**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN**

**R**

**(on the application of DURHAM COUNTY COUNCIL)**

**Claimant**

**-and-**

**SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**

**Defendant**

**-and-**

**(1) AINSCOUGH STRATEGIC LAND**

**(2) SNIPERLEY PARK LLP**

**(3) WESTPARK DURHAM LLP**

**(4) THE TRUSTEES OF LORD LAMBTON DURHAM'S  
1989 VOLUNTARY SETTLEMENT**

**(5) FRIENDS OF DURHAM GREEN BELT**

**(6) CITY OF DURHAM TRUST**

**(7) CAMPAIGN TO PROTECT RURAL ENGLAND**

**Interested Parties**

## STATEMENT OF FACTS AND GROUNDS FOR THE INTERESTED PARTY

### (5) FRIENDS OF DURHAM GREEN BELT

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## 1. Introduction

- 1.1 The Friends of Durham Green Belt ('The Friends') are from a wide geographic spread across County Durham. We have made submissions at every stage of public consultation during the preparation of the County Durham Local Plan. We have participated in 13 of the 20 sessions in Part 1 of the Examination in Public and are first-hand witnesses to the conduct of the Inspector, the Claimant and other participants. **We therefore testify to the probity and meticulous management of proceedings and the unrestricted opportunities for the Claimant to present evidence and arguments at the beginning, during, and at the end of each and every session.**
- 1.2 We have in Friends a wide range of backgrounds, including extensive higher management experience in academia, police, business and government. Our submissions have been of professional standard including valid technical analysis on significant aspects of the Plan.
- 1.3 We appreciate that the proceedings are concerned only with the legality of the decision-making up to the stage that the examination of the new County Plan has reached. However, the Claimant has deployed considerable argument about the validity of data and projections and technical conclusions. We are therefore obliged to address some of the key technical material put forward by the Claimant.
- 1.4 Similarly, we are conscious that we may be at fault in introducing new evidence made available subsequent to Stage 1 of the EiP but we do so in the knowledge that the Claimant introduces new evidence by way of the 'independent report' commissioned from NLP subsequent to Stage 1 of the EiP and relies in its Grounds to a significant extent upon the contents of that report.
- 1.5 Our representations are structured to follow the order of points made in the Claimant's Statement of Facts and Grounds. We have adopted this structure in the hope that it assists in assessing the Claimant's case. At this stage in proceedings we have not sought to refute every point.
- 1.6 At all stages of preparation of the Plan and at the EiP there has been consensus between the various community and amenity groups as to fundamentally unsound aspects of the Plan. This consensus continues to be reflected in the Statements of Facts and Grounds by Interested Party 6 City of Durham Trust and Interested Part 7 Campaign to Protect Rural England, which the Friends fully endorse and support.
- 1.7 We are unable to comment on submissions from Interested Parties 1, 2, 3 and 4 having had no sight of their Statements.

## 2. Comments on the Claimant's Introduction to his Statement of Facts and Grounds

- 2.1 The Claimant's Statement provides a introductory summary of case in paragraphs 1 to 14.
- 2.2 The Claimant's paragraph 4 claims "*These stakeholders are all supportive of the Strategy as set out in the Plan*". This is a seriously misleading statement - Friends of the Durham Green Belt are just one of a number of community and amenity groups who have from the very beginning opposed the key strategy in the Plan of building up Durham City as the 'powerhouse' to drive economic regeneration for County Durham. We have consistently argued in our submissions at every stage of consultation and in public meetings that the strategy aiming to achieve 'critical mass' for Durham City was misconceived and that, instead, a more moderate and balanced development strategy should be examined.

- 2.3 The Claimant's paragraph 5 records that the Inspector advised that, based upon the evidence submitted so far, the submitted Plan was unsound. This paragraph goes on to select "*in particular*" the Inspector's findings that the Objectively Assessed Need was too high and unsound and that the two relief roads were unsound on the basis that the roads were not justified, deliverable or environmentally acceptable. It is striking that these two aspects of the Inspector's Interim Report arouse the Claimant's particular concern, whereas the other interrelated aspects (spatial distribution, Durham City, Green Belt, Executive Housing, and Houses in Multiple Occupation/Student Accommodation) that the Interim Report finds to be unsound at this stage are not being challenged in this application for Judicial Review.
- 2.4 The Claimant's paragraph 6 states that Nathaniel Lichfield & Partners (NLP) were commissioned to conduct an independent review. It is not "*independent*". This company carried out significant commissions for the County Council and for several developers during the preparation of the Plan, and appeared on behalf of the County Council at the Examination in Public. Despite assurances about 'Chinese Walls' it stretches credibility to believe that this company would publicly report against itself. NLP are the chief assurers of the employment growth aspirations of the Plan: their paper 'Durham ELR update - defining economic growth'<sup>1</sup> is relied upon by the County Council to support the 23,000 jobs target. The Inspector's Interim Report expresses doubts about the feasibility of this target. NLP would be in a very awkward position if they found for the Inspector against their own work.
- 2.5 Indeed, the same author in another report for a different client has argued very different economic prospects for County Durham. In a presentation on 5th February 2015 to the London Society<sup>2</sup>, Matthew Spry, Senior Director NLP, shows on page 6 a map of Great Britain in which projected percentage changes in job growth in each county area over the years 2010 to 2020 is displayed. For County Durham the change in growth is shown as 0%; in other words. that there is no expectation of a significant improvement in job growth in County Durham. This is directly contrary to the sharply improved employment growth of 23,000 or more claimed in NLP's other document 'Durham ELR update - defining economic growth'.
- 2.6 The Claimant's paragraphs 10 to 12 narrate the timing of events subsequent to the Interim Report dated 18th February 2015. There is a 3 months limit for seeking Judicial Review, so the Claimant would have to make an application before 18 May at the latest. The Claimant does not respond to the Interim Report until 21st April (i.e. 62 days later), and sets the Inspector a deadline of 14 days to reply to the substantial matters raised in that response, with the 'threat' of seeking Judicial Review if he does not accept the major criticisms of his Interim Report. The Inspector in fact replies after 17 days and rejects the criticisms. The Claimant concludes paragraph 12 with "*The Claimant has been left with no alternative but to make this application to the Court.*"
- 2.7 This is an entirely false construction of the Claimants' options - the Claimant has the three clearly stated options in paragraphs 110 to 115 of the Interim Report. That the Claimant does not like the Interim Report's findings on 9 of the submitted Plan's 65 policies is evident, but the clear way forward is to work with stakeholders, including local community and amenity groups, to adjust the Plan such that its aspirations are realistic and its policies do not offend against the National Planning Policy Framework. That is the middle option set out by the Inspector and is one for which the local community and amenity groups have explicitly declared enthusiasm,

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<sup>1</sup> DCC bundle, document 9, pages 218 -262.

<sup>2</sup> CDT bundle, page 42

offering to work constructively with the Claimant<sup>3</sup>, an offer which the Claimant has rejected by the application for Judicial Review.

### **3. Comments on the Claimant's summary regarding Ground 1**

- 3.1 The Claimant's paragraph 13a(i) states that it is unclear from the Inspector's reasoning whether he accepted or rejected that 23,000 jobs would be created in the area during the Plan period. It is in fact very clear in paragraph 39 of the Interim report that he regards reliance on the 23,000 jobs target as an "*unacceptable risk*". Further, he explicitly states that the figure of 6,000 jobs at Aykley Heads is "*unconvincing and excessively optimistic*".
- 3.2 The Claimant's paragraph 13a(iii) asserts that the Inspector's preference for a figure of 18,627 new jobs (rather than 23,000 new jobs) "*failed to pay any proper regard to the economic growth objectives contained in the NPPF*". Actually, a growth by over 18,000 in the number of jobs in County Durham would be remarkably good economic growth when considered in the light of NLP's 'Durham ELR update - defining economic growth'<sup>4</sup> paragraph 3.12 information that in the period 1999 to 2014 employee jobs grew from 178,000 to 184,000 in County Durham. This is a growth of 6,000 jobs over a 15 year period, so a growth of 18,000 jobs over the 19 year period of the Plan is a very positive proposition.
- 3.3 The Claimant's paragraph 13a(vi) says that there was no evidence before the Inspector to enable him rationally to conclude that the existing commuting patterns for Durham were unsound. In fact, it is not the existing commuting patterns that he found unsound, it is the Plan's assumption that the required target of 30,000 extra jobs to support the 57,000 additional population can be provided by 23,000 extra jobs in County Durham and an additional 7,000 net commuters to jobs in neighbouring local authorities.
- 3.4 The Claimant's paragraph 13a(vii) concludes that the Inspector's lowering of Objectively Assessed Need for new dwellings to 1,435 dwellings per annum is an error in law by failing to consider whether the figure needs to be higher in order to enable the required OAN for affordable housing. On the contrary, the Inspector gives explicit consideration to this matter in the final sentence of paragraph 42 of his Interim Report.

### **4. Comments on the Claimant's summary regarding Ground 2**

- 4.1 Friends of Durham Green Belt support the case put by Interested Party 6 City of Durham Trust.

### **5. Comments on the Claimant's summary regarding Ground 3**

- 5.1 The Claimant's paragraph 13c objects to the Inspector's handling of verbal and written contributions to the Examination. Our participation before and during the Examination enables us to testify from first-hand witness that the Inspector was indeed inquisitorial and forensic in his approach; he set 'homework' for the Claimant on several matters which he declared required clarification and revision (in particular, he spelled out in crystal clear terms his interim conclusions on the fundamentally unsatisfactory formulation of the Plan's Policy 32 for HMOs and student accommodation); and he accepted our speaking notes for the sake of having an accurate record of what had been said - there is nothing in the notes that had not been said in front of the Claimant and their legal representative during the relevant sessions, in the course of which and at the end of each the Claimant was offered the opportunity to respond.

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<sup>3</sup> CDT bundle, pages 25 and 26.

<sup>4</sup> Op cit. (see footnote 2)

## 6. Comments on the Claimant's summary regarding Ground 4

- 6.1 The Claimant's paragraph 14 reprises the NLP report. We have explained that this should not be regarded as '*independent*' and we endorse paragraph 12 of the Planning Inspectorate's letter dated 8 May 2015<sup>5</sup>.
- 6.2 The NLP report was produced subsequent to the Examination in Public and should not, in our view, be considered as part of the process of deciding if a Judicial Review is warranted. It has not been open to public challenge by objectors and should be irrelevant to any decision on a Judicial Review.

## 7. Comments on the Claimant's Statement regarding legal framework

- 7.1 We do not have expertise to make submissions on the Claimant's paragraphs 15 to 34.

## 8. Comments on the Claimant's Statement regarding factual background

- 8.1 The Claimant's paragraphs 35 to 47 restate sections of text from the submitted Plan and from the Inspector's Interim Report, ending in a repetition of the Claimant's reasoning for making an application for Judicial Review. We do not believe that this material assists in determining whether there is a case for Judicial Review, and therefore we feel there is nothing to be achieved by submitting extracts from the evidence we provided at the Examination.

## 9. Comments on the Claimant's Statement regarding amenability to Judicial Review

- 9.1 The Claimant's paragraphs 48 to 55 expand upon the Claimant's representation that the Inspector's Report of 8th February 2015 is not Interim but Final. The argument in paragraph 51 is that the Inspector offers three alternatives under which "*the Council would realistically have no choice but to end the plan-making process*".
- 9.2 We submit that this is an incorrect interpretation of the plan-making process. Indeed, it would appear to be requiring a further stage to be introduced into the established examination procedure so as to give a second chance to promote the direction of strategy, the scale of growth, the unsustainable proposals for relief roads and the outward spread of Durham City into the Green Belt.
- 9.3 The Inspector's interim judgement that 9 of the submitted Plan's 65 policies fail the Government's test of soundness does not appear to us to involve any illegality. **We believe that the Council can continue the plan-making process speedily and effectively by tabling replacement 'main modifications' policies that accord with the Inspector's advice. The Examination can then immediately proceed to Stages 2 and 3, after which a Final Report can be issued. Only then, we understand, could a Judicial Review be held.**

## 10. Comments on the Claimant's expansion of Ground 1: The Inspector erred in law by concluding that the OAN of 1,651 dpa was unsound

- 10.1 We shall not repeat our earlier comments on Ground 1. Essentially, we would be delighted if 18,000 or, even better, 23,000 new jobs materialise in County Durham between 2011 and 2030. But the causal links assumed between the potential number of new jobs and the Objectively Assessed Need for new dwellings is strongly disputed, as follows.

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<sup>5</sup> DCC bundle, page 120, paragraph 12

- 10.2 The Claimant's paragraph 66 has the following remarkable statement: "*It follows that the housing figure preferred by the Inspector would result in fewer jobs being created over the Plan period, and therefore less economic growth, than if no local policy interventions or developments were promoted at all.*" (The point is repeated in Paragraph 68). This is an inverse of reality. The Claimant's population and household projections are produced by a mathematical model which is independent of the number of jobs. The Council then sets a target 'employment rate' from which the model deduces how many jobs would need to be created to support the aspired level of population. Running the model backwards to assert that there would be fewer jobs if there were fewer households/dwellings is plainly absurd.
- 10.3 As to whether a dpa of 1,651 is unsound as against a figure closer to 1,435 it is essential to determine whether the Claimant's aspiration for the population to increase from 513,200 in 2011 to 570,500 in 2030 is "*realistic*". In the period prior to the start of the Examination the Claimant was aware of but dismissive of the official ONS 2012-based population projection of 549,000 for the year 2030. The difference of about 21,000 in projected populations is extremely significant for the calculation of numbers of households.
- 10.4 In this regard we are struck by a report issued by Nathaniel Lichfield & Partners (NLP) on 27th February 2015<sup>6</sup> (and therefore available to the Council before embarking upon this application for Judicial Review) that discusses DCLG's latest projections for households. NLP's Table 1 displays for each local authority the annual change in numbers of households, first as in DCLG's 2011-based interim projections and then in DCLG's latest 2012-based projections. For County Durham the table shows that the annual increase in numbers of households projected by DCLG has gone down from 1,579 per year to 1,212 per year. We suggest that the annual net increase in the number of dwellings would correspond much closer to 1,212 than to 1,579. The Inspector's preference for a figure around 1,435 dpa rather than 1,651 dpa is fully justified.
- 10.5 We have set out these figures to challenge the Claimant's view that the Inspector's assessment and recommendation on this technical matter is unlawful. Our view is that it is simply a matter of judgement resulting from a debate about the probability and the strength of the evidence, a debate where the Claimant's aspirations could not be fully justified.

## **11. Comments on the Claimant's expansion of Ground 2: The Inspector erred in law in concluding that the relief road policies (Policies 9 and 10) were unsound**

- 11.1 As stated earlier in our paragraph 4.1, Friends of Durham Green Belt support the case put by Interested Party 6 City of Durham Trust. We also support the case put by Interested Party 7 Campaign to Protect Rural England.

## **12. Comments on the Claimant's expansion of Ground 3: Procedural unfairness/breach of natural justice**

- 12.1 From a procedural point of view, the Inspector has to give weight to the written representations he has received and those he hears at the EIP. As an example, there were about 310 representations relating to Policy 9. Of these, 23 were from groups or organisations, some of whom were heard at the EIP. Four were from developers who made objections mainly on the issue of procedures for the payment of infrastructure. There were five individual supporters to the Policy. There were 288 objectors to the Policy, nearly all of whom chose to not ask to appear at the EIP. Some of the objections were copies of each other but many raised

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<sup>6</sup> FDGB bundle, page 17, Table 1

points that the Inspector would have needed to have considered in turn. They show a detailed knowledge and understanding of the issues; in addition the Inspector made site visits, both accompanied and unaccompanied as required by PINS' procedures. The Inspector has therefore prepared his Interim Report on the basis of all the relevant information before him, unlike the report by NLP which the authors note in their paragraph 1.6 did not cover all the evidence submitted to the EiP, and has understandably come to a different conclusion from the Council and the developers.

12.2 The Inspector held a Pre-Hearing Meeting on Thursday 31 July 2014 and produced guidance notes for participants (INSP2)<sup>7</sup>. The notes of this Pre-Hearing Meeting (INSP4)<sup>8</sup> state that *"The Council were represented by the following; Mike Allum - Spatial Policy Manager, Neil Foster - Portfolio Holder for Economic Regeneration, Ian Ponter - Barrister, King's Chambers, Michelle Robinson - Spatial Planning Team Leader, Graeme Smith - Principal Policy Officer, Stuart Timmiss - Head of Planning and Assets"*. The notes state that: *"The Council was invited to ask questions about procedure and management of the Examination. There were none so the Inspector then opened questions to everyone present."* **The Council and its Barrister therefore had every opportunity to challenge as unfair or unlawful the Inspector's proposals for the conduct of the Examination and they did not do so.**

12.3 The Inspector's guidance notes state that the people able to participate in the EiP were people/groups/organisations who had responded to the Pre-Submission version of the Plan between 4 October 2013 and 6 December 2013, and that they should be those who were seeking some change to the Plan to make it sound or legally compliant. The Programme Officer spent a lot of time with Council officers checking the consultation database to see who were able to participate in the hearings and what matters they could comment upon. The Council, and other parties, therefore had plenty of opportunity to complain if certain parties were not able to participate in the EiP and to justify why such parties should be allowed to participate, or for the Council to introduce these parties' points into their own additional written or verbal statements.

12.4 The Council was represented at every session of the EiP by a large team of staff (including planning officers professionally well versed in planning law) plus a Barrister. We testify that the Barrister played an active and vigorous part in the proceedings. At no point did the Council or its Barrister challenge the legal conduct of the EiP.

12.5 On the matter of unfairness, not only did the County Council ignore the Inspector's advice as to re-working Policy 32, they ignored his direction that they should discuss it with those concerned parties at the session<sup>9</sup>. Indeed, the Council asked the Inspector towards the end of the session whom should they invite to that meeting and he replied *"the people around this table"*. Instead, the Council held a separate meeting with two student accommodation developers<sup>10</sup> neither of whom had been *"around this table"*. The resulting revised Policy 32 was still deemed unsound because it did not include all the aspects as advised by the Inspector. There seems to be no evidence of the Claimant having been the victim of procedural unfairness or breach of natural justice.

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<sup>7</sup> FDGB bundle, pages 21 - 27

<sup>8</sup> FDGB bundle, pages 28 - 39

<sup>9</sup> FDGB bundle, page 46 , paragraph KP22

<sup>10</sup> FDGB bundle, page 49

### **13. Comments on the Claimant's expansion of Ground 4**

13.1 The Claimant's paragraph 118 represents PINS as having "*proposed*" the re-opening of the Examination to enable the Council to produce further evidence. In fact, the minutes<sup>11</sup> of the meeting with PINS show that PINS "*wondered whether there might be a possibly 'hybrid' option which could involve a further EiP hearing session(s) ....*" and "*agreed to float this hybrid potential with the Inspector*". These terms "*wondered*", "*possibly*", "*could involve*", "*float*", "*potential*" are qualifiers that fall well short of "*proposed*".

13.2 The Claimant's paragraph 119 compounds the misrepresentation of PINS' position. It states "*Thus PINS clearly agreed with the Claimant that the appropriate way forward was to re-open the examination in public to enable further evidence on these issues to be submitted.*" In fact the note of the meeting unmistakably includes the three options put in the Inspector's Interim Report as being possible ways forward; it states "*As a possible way forward, in addition to the three options set out in the Inspector's conclusions, PINS wondered.....*"

13.3 The note of that meeting does not indicate whether the matter of a Judicial Review was raised. The Council must have been preparing the claim by then. If PINS did not know about the Judicial Review, it is improper for the Council to then use the Inspector's refusal as a Ground for the Judicial Review.

### **14. Conclusions of Friends of Durham Green Belt**

14.1 It is the respectful view of the Friends of Durham Green Belt that:

- (1) Stage 1 of the Examination in Public was conducted in an exemplary manner by the Inspector. The Claimant opened and closed every session, and had every opportunity to challenge the conduct of the Hearings and did not do so;
- (2) the pre-Examination meeting with the Inspector set out whom could be heard and how the published Guidance would be applied. The Claimant made no objection to any aspect of these matters;
- (3) The Inspector has issued an Interim Report. The Examination is still open with Stages 2 and 3 to undertake. Only thereafter will a Final Report be issued, and only then could a Judicial Review be held; and
- (4) the Claimant's Grounds fail to prove an error in law by the Defendant and therefore permission to bring Judicial Review proceedings should not be granted.

KIRSTY THOMAS  
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11th June 2015

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<sup>11</sup> DCC bundle, document 2, pages 82 - 83