

APPENDIX 18
COUNSEL ADVICE

TRAFFORD COUNCIL

POLICY L2.12 – AFFORDABLE HOUSING REQUIREMENTS

ADVICE

1. I have been asked to advise Trafford Borough Council (“the Council”) on the correct interpretation of policy L2.12 of the Council’s Core Strategy 2012 (“the CS”). It provides for affordable housing (“AH”) percentages in different areas and the fourth bullet states:

“In those parts of Trafford Park identified for residential development, or in areas where the nature of the development is such that, in viability terms, it will perform differently to generic developments within a specified market location the affordable housing contribution will be determined via a site specific viability study, and will not normally exceed 40%”.

2. The central question which arises is how the Council should determine if any particular development will perform “differently to generic developments within a specified market location”. That in turn requires an understanding of what a “generic development” means in this context.
3. I conclude that L2.12 sets generally applicable AH requirements at levels which it has been judged all of the assessed development typologies in a particular Market Location can sustain (subject to site specifics and abnormals). The fourth bullet covers sites and developments on them which depart from the norm in that Market Location which drove the relevant percentage (in Old Trafford 5 – 10%) in the first place. Thus, if development of a different scale, density, mix or value from the norm or in a particularly desirable location comes forward the 4th bullet may be triggered. Where and when it is triggered is a matter for expert judgment but against the benchmark I have set out below.

The Core Strategy and Viability Testing

4. For the purpose of affordable housing requirements and viability testing, Trafford's area is split into 3 categories – hot, moderate and cold market locations (“the Market Locations”): Core Strategy 2012 - Policy L2.9.

5. The viability testing underpinning policy L2¹ is incorporated into L2 by reference (L2.13) and is to be used “in the determination of individual applications”. It considers each Market Location separately, considering a set of scenarios and “representative sample sites” for each (see para 1.14/3.15/4.4) and assumed density according to densities shown in the SHLAA for that Market Location (para 3.18). Three forms of housing scheme were considered – apartments only at a density of 140 units/ha; mixed at a density of 52 units/ha and houses only at a density of 40 units/ha (1.17). Case studies expressly assumed a “generic” form of development on 0.5ha in each Market Location (para 6.5ff). Whilst not in itself central to the analysis, in hot market locations, an apartment scheme was modelled (70 units), in moderate market locations a mixed apartment and housing unit scheme (26 units) and in cold market locations a housing only scheme (20 units)². Around 80% of the sample sites were less than 0.8 ha with only about 18% (of whatever size) being judged capable of delivering more than 50 units (p26).

6. Across all the typologies, the viability testing then assessed what level of affordable housing was viable in that Market Location. Importantly it did not adopt a different approach to viability testing for the sites which may be able to accommodate dense, tall developments nor those in particularly desirable locations. The 140 unit/ha density was the top end of the range assessed and would equate to a relatively low (4 – 5 storey) apartment scheme with amenity space, car parking, a wide range of unit sizes to meet the required mix and relatively generous space standards – it did not

¹ The Trafford Economic Viability Study 2009 (GVA Grimley) – the 2011 Updates do not impact the issues in this Advice.

² At that time, the Lancashire County Cricket Club (“LCCC”) Quarter strategic location did not include any housing and so it was not tested for affordable housing viability.

consider the tall, dense, small units only, limited amenity space and/or limited car parking that would generate higher densities and thus potentially higher values.

7. It was thus judging viability at a Market Location wide level for a range of generic developments of relatively low density. At that high level, in cold Market Locations, and good market conditions, only 10% affordable housing was judged to be viable against the borough wide ambition of 40%. Or to put it another way, all development typologies in that Market Location could sustain 10% affordable housing (subject of course to site specifics/abnormals).
8. However, it was clear that it was not appropriate to apply that high level approach to all sites. Para 11.18 of the supporting text states as follows:

“The Viability Study considered a number of specific sites that, in economic viability terms, appeared to out-perform their generic market location expectation and therefore would be able to deliver significant proportions of affordable housing, even at future CfSH levels. However, given that the study was based upon broad development assumptions, such sites should be reappraised by the Council based upon further detailed site specific information, prior to negotiating affordable housing (and other) contributions.”

9. It can thus be seen that even within the representative sample sites used in the Study, there was a recognition that some sites may, by virtue of their specific circumstances or the nature of the development proposed out – perform thus justifying a different and “site specific” approach. The 4th bullet embodies that approach. In the case of Old Trafford there were, in particular, a number of possible sites which were then proposed at a higher density than that modelled in the viability work and to which the para 11.18 and bullet 4 would thus apply.

Meaning and Application of L2.12 fourth bullet

10. “Generic” means “characteristic of or relating to a class or group of things; not specific”. A characteristic of all sites in the Cold Market Location was that they could sustain 10% affordable housing and that was thus required by policy.

11. However, that feature of *all* sites was judged by policy to be inadequate to capture the features of *some* sites hence the fourth bullet. A “generic development” is thus a development which it is judged will perform as for all sites in the Market Location in valuation terms. For the fourth bullet to apply there has to be some identifiable feature of the site itself or of the development proposed on it which takes it out of the norm for developments in that area in viability terms.
12. What then is the norm against which outperformance is to be judged? Given that the 10% is the level at which all development is judged viable, the norm is thus the small scale, low density developments included in the underlying typologies – thus up to around 140 d/ha. They will, in general, to be subject to the 10%. Any site which it is thought will outperform that in viability terms would be subject to the fourth bullet.
13. Whether “it will perform differently” is a matter for expert judgment. Any reasonably competent valuer or viability expert would be able to reach a judgment as to whether a particular development on a particular site would be expected to perform differently from the basic performance on which the 10% is based.
14. It is important that the fourth bullet is not used to disapply the first bullet. The default position in Old Trafford would remain 10% (5% under L2.12 first bullet plus the uplift for hot market conditions). It is not possible to revisit that starting point. However where the development exhibits features which render that generic position inapplicable then the fourth bullet must be applied.
15. The process should be as follows (this applies in Moderate and Cold Market Locations but I have been asked to focus on Old Trafford):
 - a. on receipt of an application a view must be taken as to whether L2.12 fourth bullet is triggered on the above logic – to this end the view of a viability consultant or in house expert should be sought – and the views recorded;

- b. this would only be expected to generally be the case for more dense, taller, schemes beyond the 140d/ha maximum density typology modelled. It would be plainly relevant in high density, high schemes, with small units (predominantly one and two bed and those which do not meet the mix requirements in the Plan) with limited amenity space and/or parking especially if they create a different product for a different market or a new destination;
- c. if it is considered that the fourth bullet is triggered, then an FVA should be requested/required with reasons;
- d. at that stage the applicant can explain why the development is within the ambit of generic development or would not be expected to outperform generic developments; but
- e. more likely would provide a FVA which would then go through the normal processes.
- f. If the developer refuses to provide such a FVA, a broad assessment could be undertaken to test whether 10% remains appropriate or what other percentage would be required and the application determined accordingly.

16. I recognise that the language of L2.12 is not ideal but when read with the Viability Study which is incorporated by reference and with para 11.18 in mind it is clear what was the policy intent. The Courts and Inspectors can be expected to give effect to that policy intent even though the wording could have been clearer. I do not consider that the wording is “inoperable” or incapable of being given effect to. No doubt difficulties may emerge at the margins and some contrary interpretations could be put forward but having read all the material in total I conclude the policy is effective, its aim clear and its breadth capable of being understood when it is understood in its context.

17. The Council could have applied a 40% requirement across the board and required site specific viability testing to depart (downwards) from this. The fact that it has started

at the other end of the spectrum but provided for upward variation where appropriate is somewhat unusual but does not invalidate the policy or make it impractical to apply.

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