

Our ref: 21/01028/OUTMAJ
Your Ref: APP/D2320/W/22/3295556
Date: 9 February 2023

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Mr Phil Barber
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**TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL MADE BY THE MINISTRY OF JUSTICE
LAND ADJACENT TO HMP GARTH AND HMP WYMOTT, LEYLAND, LANCASHIRE
APPLICATION REF: 21/01028/OUTMAJ**

Dear Mr Barber,

1. We are writing in response to your letter of 19 January 2023 ("the Letter") relaying the 'minded to grant' decision by Lee Rowley MP in relation to the proposed prison ('the Prison') at Land Adjacent to HMP Garth and HMP Wymott ('the Site').
2. This is a letter written on behalf of Chorley Borough Council ('the Council') and Ulnes Walton Action Group ('UWAG') who were the other two main parties at the public inquiry between 12-15, 19-20 and 22 July 2022 before Inspector Tom Gilbert-Wooldridge BA ('the Inspector'), and who both opposed the Prison.
3. The Council and UWAG were pleased to see that the Inspector rightly recommended that permission be refused on the basis that Very Special Circumstances ('VSC') did not exist to justify the inappropriate development in the Green Belt (and was thus contrary to the development plan and NPPF). The Inspector also found that the proposal would have an unacceptable effect on highway safety contrary to paragraphs 110 (d) and 111 of the NPPF. This was a position that was – on the evidence heard and tested at the inquiry – agreed by Mr Rowley on behalf of the Secretary of State ('SoS').
4. It was therefore surprising that the SoS did not – as would be expected – refuse planning permission but instead took the highly unusual approach of issuing a 'minded to grant'

decision pending the submission of further evidence on highway safety. The reasoning provided was that “*the Secretary of State considers that the highway safety issues may be able to be resolved satisfactorily*”.

5. The ‘procedure’ for this submission of further evidence was set out at paragraph 41 of the Letter:

The Secretary of State considers that given the nature and amount of work required, a period of six weeks would be appropriate to allow this additional evidence to come forward. He therefore requests the appellant and other parties to provide any additional evidence on these matters by 2 March 2023. Evidence put forward will then be circulated for parties for comment before the Secretary of State proceeds to his final decision.

6. It should be noted at the outset that the Council and UWAG have significant concerns about the proposal to allow the Appellant to submit further evidence at this late stage. The Appellant was professionally represented in their preparations for and at the Inquiry and had ample time to demonstrate that its proposals were safe; it manifestly failed to do so.
7. At no point during the course of proceedings to date did the Inspector – who had the benefit of hearing evidence at the eight-day inquiry – consider it appropriate to adjourn the hearing or permit the Appellant an opportunity to admit late evidence. Even more tellingly, neither did the Appellant make any application in relation to the same, either before, during or even in the six months since the Inquiry.
8. In ordinary circumstances no question of a further chance to make good its case would be afforded.
9. However rather than challenge that overarching decision at this point we – reluctantly – wish to engage with the SoS’s suggested way forward.
10. The Council and UWAG have significant concerns about the fairness of the proposed procedure set out in the Letter. As presently described, it is manifestly unsuitable for the purpose of considering, and testing, any further evidence the Appellant may choose to submit.
11. The issue of Transport (i.e highway capacity and highway safety) is inherently a technical and specialist area which is unsuitable to being dealt with by written submissions. At the Inquiry, the issue of Transport was the subject of two expert Proofs of evidence from the Appellant and

Council, a third Rebuttal Proof from the Appellant, all of which were subject to detailed testing through cross-examination which took at least a day of Inquiry time.

12. It was only through this process of scrutiny and the testing of evidence that the flaws and omissions of the Appellant's highway evidence was established which justified the Inspector's conclusion to refuse partly on highway grounds. To be clear: the highway safety concerns that led the Inspector to recommend refusal of permission, and on which basis Mr Rowley agreed that the proposals were not presently worthy of planning permission – were only exposed via cross-examination and rigorous testing of the evidence before the inquiry.
13. It would therefore be entirely inappropriate and contrary to principles of procedural fairness and natural justice to 'downgrade' the further consideration of the central issue of highway safety to (effectively) a written representations procedure.
14. It is further unclear how the procedure would work in practice. If the Appellant does produce further evidence, the Council and UWAG will then need to consider that evidence, which may well be a significant quantity of new technical highways evidence, and likely produce evidence in response. There will also need to be the input of other statutory consultees. There is no timeframe given for this, and no provision in the 'paragraph 41' procedure for the Appellant to then respond (and the parties to respond to that response).
15. Presently, the SoS position appears to be simply to give the Appellant a further opportunity following the close of the Inquiry to fill evidential gaps identified in its case by the Inspector, without giving the other parties an opportunity to engage with the same.
16. The above illustrates that the Letter's proposed procedure for resolving the complex and contested issue of highway safety is inappropriate and cannot be used. Instead, the only appropriate way in which to further consider the point is through the **re-opening of the Inquiry**.
17. The Council and UWAG therefore make the formal request that the SoS re-opens the Inquiry, should the Appellant (as is anticipated) take up the opportunity of putting in further highways evidence.
18. This is justified on principles of procedural fairness and natural justice for the reasons given above. This should be sufficient for the SoS. However, if further legal justification is required the Council can provide it as local planning authority.

19. The SoS will be aware that the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 ('the Rules') apply to these proceedings (per Rule 3). The Rules are designed to assist in facilitating all parties in knowing the case they have to meet; providing an opportunity to adduce evidence and make submissions in relation to that opposing case; and promoting efficiency.
20. Rule 17 (5) and (7) together give the local planning authority a power to demand an inquiry be re-opened in certain circumstances:

If, after the close of an inquiry, the Secretary of State—

(a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or

(b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),

and is for that reason disposed to disagree with a recommendation made by the inspector, he shall not come to a decision which is at variance with that recommendation without first notifying [in writing] the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or new matter of fact, not being a matter of government policy) of asking for the reopening of the inquiry.

.....

(7) The Secretary of State may, as he thinks fit, cause an inquiry to be re-opened, and he shall do so if asked by the applicant or the local planning authority in the circumstances mentioned in paragraph (5) and within the period mentioned in paragraph (6); and where an inquiry is re-opened (whether by the same or a different inspector)—

(a) the Secretary of State shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters with respect to which further evidence is invited; and

(b) paragraphs (3) to (8) of rule 10 shall apply as if the references to an inquiry were references to a re-opened inquiry.

Emphasis Added

21. The underlined sections set out that where the SoS takes into account new evidence, and for that reason is disposed to disagree with a recommendation of an Inspector, then they must inform any party who appeared at the inquiry of it. Once informed the local planning authority

have the right to request that the inquiry be re-opened. If such a request is made by the local planning authority, then the SoS “*shall do so*”. i.e. it is non-discretionary.

22. The Council – who would be exercising the power – does accept that the requirement to notify under Rule 17 (5) (from which their power to demand the Inquiry be re-opened flows) is only triggered when new evidence is submitted. Currently there is simply an opportunity for the Appellant to provide new evidence to the SoS.
23. **But** if that evidence were to be submitted then it would clearly meet the criteria of Rule 17 (5) if the SoS (as per the ‘minded to’ position set out in the Letter) then wished to grant permission for the Prison. The new highway evidence would be relied upon by the SoS to disagree with the Inspector’s recommendation to refuse permission partly on highway grounds. In such circumstances, the SoS would be required to notify the Council, and in turn the Council would be entitled to request the inquiry be re-opened within three weeks of notification (per R 17 (6)), and the SoS would have to accede to such a request.
24. The Council is content to use this letter to confirm that they will – if new evidence is submitted by the Appellant – formally request the inquiry be re-opened under Rule 17.
25. Given the Council’s position, it would be highly impractical for the SoS to continue partly down the ‘paragraph 41’ procedure before being forced to abandon it and re-open the Inquiry once the Council gives formal notification under Rule 17. Instead, it would be beneficial for all parties (and the SoS) to abandon the ‘paragraph 41’ procedure and formally re-open the inquiry now to allow for highway evidence to be submitted and properly tested.
26. The Council and UWAG would submit that this should be done by the re-opening of the Inquiry before Inspector Tom Gilbert-Wooldridge and the holding of a Case Management Conference to allow for a realistic and pragmatic timetable to be set. This is the only approach which ensures a semblance of procedural fairness and avoids either the Council and UWAG being prejudiced by the SoS’s highly unusual request for further evidence at the eleventh hour.

Conclusion and Next Steps

27. The Council and UWAG have grave concerns about the proposed procedure for the consideration of further highway evidence. It appears entirely unsuitable for considering the technical and complex unresolved issues. The Council and UWAG instead request that the Inquiry be re-opened.

28. This request is currently made on the basis of the procedural unfairness and natural injustice that would be caused by the unprecedented downgrading of highways to written representations.
29. However, the Council would also have the power – once evidence is received – to formally request the Inquiry be re-opened under Rule 17 of the Rules. The SoS would have to follow this request. The Council can confirm – if further evidence is submitted by the Appellant – they will make this formal request and the Inquiry will have to be re-opened.
30. There is therefore little practical gain in the parties engaging with the SoS’s ‘paragraph 41’ procedure when it will have to be abandoned after 2 March 2023 in favour of a re-opened inquiry.
31. The Council and UWAG therefore make the following request:
- i) The SoS formally re-opens the Inquiry.
 - ii) Alternatively, the SoS confirms that on the receipt of further highway evidence they will have to notify the Council and UWAG under Rule 17 (5), and re-open the Inquiry upon the Council’s request under Rule 17 (7).
32. The Council and UWAG request that the SoS responds to the above request by **16 February 2023** at the latest. This will allow the Council and UWAG to consider their legal recourse if the SoS disagrees with one or both of the above points.

Yours faithfully,

Adele Hayes, Chief Planning Officer
on behalf of Chorley Borough Council

Emma Curtis on behalf of UWAG