COMMERCIAL ESTATES GROUP

OUGHTIBRIDGE

FURTHER OPINION

1. I have previously advised in relation to the application of Vacant Building Credit in relation to the above-mentioned site. I am now asked to comment on the findings of an Inspector, Grahame Gould, who dismissed an appeal in relation to residential development of Patchetts Equestrian Centre, Watford dated 27th April 2017.

2. The appeal related to the refusal by Hertsmere Borough Council ("HBC") of planning application reference 16/1188/FUL for:

   "Demolition of equestrian facility, removal of hard standing, buildings and structures and the redevelopment of the site to provide 46 new dwellings (with 4 affordable units), parking, gardens and village green. The redevelopment will include the conversion of Urn's Barn into a residential unit and the retention of the barn, Little Patchetts and The Coach House as residential units, Existing access from Hilfield Lane to be retained with new access from Hilfield Lane. (Variation of Affordable housing from 15/1433/FUL)."

3. This was a resubmission of scheme which was, save for one significant difference, identical to that previously granted planning permission by HBC under planning permission reference 15/1433/FUL. The significant difference was that whilst the original scheme included 20 affordable homes (40% affordable housing in accordance with Policy CS4 of the Hertsmere Core Strategy (2013)), the appeal scheme proposed only 4 affordable homes.

4. It is clear from the reasoning of the Inspector at DL 27 that the buildings in that case were not lying vacant at the time of pre-application discussions DL 27; and further, the previously granted planning permission reference 15/1433/FUL, had been implemented: DL 25.

5. The reason for the proposed reduction in the number of affordable homes was that the appellant considered that the development should benefit from the Government's Vacant Building Credit (VBC) policy.

6. It was common ground that the development would result in around a 20% increase in floorspace, equating to a requirement for 4 affordable dwellings if the VBC is applied (DL 15)

7. It was also common ground that a proposal for just 4 affordable dwellings put the development in conflict with Policy CS4 (DL 16).

8. The Inspector identified the main issue as whether the development would make adequate provision for affordable housing (DL 9). The Inspector's conclusion was that the level of provision was inadequate and gave "*rise to an unacceptable conflict with Policy CS4 by failing to address the acute need for additional affordable housing in Hertsmere*." (DL 40).

9. This Further Opinion considers whether the Inspector's decision was legally flawed.

Summary of Opinion

10. For the reasons set out in paragraphs 20 – 24 below, I consider that the Inspector's decision was legally flawed. In the context of the VBC policy, the incentive for developing brownfield land goes beyond issues of viability. It goes to the manner in which a site will be developed, the specification of the

development (for example the standard of the finish), as well as the extent of the development, and the timescale within which the development is commenced and completed. All of the aforementioned points are relevant to the incentives of a developer in the manner in which the development is carried out but it is certainly possible that none of them would make a difference as to the issue of viability. In other words, a development may be entirely viable but a developer is entitled to take the benefit of VBC if it incentivises his development of brownfield land. Furthermore, and this is important – as set out in my original Opinion at eg, paragraphs 2, 11 and 17 – it is important to draw a distinction between the obtaining of planning permission and the implementation of it.

11. What the Inspector did, however, was to see the application of an affordable housing Viability Assessment ("VA") as effectively a preferred course, or as he described it at DL 36 "an alternative route"; and that the invocation of VBC was only open to an applicant if they had first undertaken a VA. In other words, the Inspector considered that the undertaking of a VA was a required first step before invoking reliance on the VBC policy. That this was the Inspector's approach is underlined at DL 40. The Inspector's decision was therefore flawed.

The Inspector's reasoning

12. The Inspector set analysed the terms of the national and local planning policy. This included an analysis (DL 14) of paragraph 023 of the PPG which identifies when VBC may not be applied (buildings that have been abandoned); and relevant considerations to which LPAs may have regard which include "the intention of national policy"; and in so doing it may be appropriate for LPAs to consider whether the building has been made vacant for the sole purpose of redevelopment and whether the building is covered by an extant or recently expired planning permission for the same or substantially the same development.
13. The Inspector stated at DL 19 that "Given the acute need for new affordable homes, for a non-Policy CS4 compliant scheme to be viewed as being acceptable

there would need to be a material consideration of great weight to justify a departure from Policy CS4 being made. The application of the VBC is a material consideration that might warrant such a departure." He then went on at DL 20 to state: "In order to be able to reach a conclusion on the main issue I have identified, and having regard to the conflict with Policy CS4 and the cases made by the parties, it is necessary to consider whether the VBC's application would be ***the only means*** of incentivising this site's redevelopment". (My emphasis).

14. At DL 22 the Inspector noted that, *"Having regard to the wording of the WMS and paragraph 022 of the PPG, of itself viability is irrelevant to the calculation of the VBC because it is determined solely by reference to changes in floorspace."*

15. However at DL 22 and 23 the Inspector then went on to consider specific circumstances in which the application of VBC would either do little to incentivise a site's redevelopment (brownfield sites with little in the way of vacant buildings upon them) or a great deal when applied as part of a much wider review of viability (brownfield sites with other infrastructure contributions as well as affordable housing).

16. The outcome of this was that the Inspector decided at DL 24 that he was *"not persuaded that a viability review under a policy, such as Policy CS4, duplicates the intention of the VBC to incentivise brownfield development. I therefore consider that in deciding whether or not the affordable housing requirement should be reduced in this instance, a detailed assessment of viability should not simply be cast aside in favour of the straight application of the VBC."*

17. After a discussion about the circumstances which led to the appellant asking for VBC to be applied to the first planning permission, and the extent to which the development needed to be incentivised (DL 25-35), the Inspector decided at DL 36 that:

"At the heart of the appellant's wish for the VBC to be applied to this scheme is an issue with viability….While seeking the VBC's application was a course of action that was open to the appellant, an alternative route for a second application would have been to base it on a viability review under Policy CS4, an option that the appellant appears to have ignored."

18. Whilst the Inspector also concluded that the existence of a partly implemented extant permission weighed against the application of VBC (DL 38) it is clear that so too did the absence of a viability appraisal ("VA"). The Inspector therefore found that a VA under Policy CS4 would have the potential to address cost pressures and would be consistent with the underlying intention of the VBC to incentivise brownfield development. (DL 39)

19. In the circumstances the Inspector found that he was *"not persuaded that applying the VBC represents either the only option or the most appropriate was of addressing any issues with this scheme's viability."*

Analysis

20. In Bloor Homes East Midlands Ltd v. Secretary of State for Communities and Local Government[1], Lindblom J (as he then was) cited at paragraph 19 seven familiar legal principles which are relevant to the determination of challenges to decisions of the Secretary of State and Inspectors:

(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating

[1] [2014] EWHC 754 (Admin)

to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into *Wednesbury* irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a

failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145).

21. It is clear that there was a good deal of discussion and argument at the inquiry as to the relevance of undertaking a VA. The Appellant clearly submitted that such was a separate consideration to the issue of VBC and that VAs duplicated or in

part duplicated the application of VBC. The Inspector did not accept that for the reasons he gave at DL 22 and 23, and I have to say that I do not disagree with the Inspector's analysis, insofar as relevant, for the reasons he gave.

22. I say "insofar as relevant" because I do not consider the issue of duplication is itself relevant to the proper understanding of the arguments. It seems to me to be obvious that VBC and a VA are two wholly separate exercises but they both might be engaged to a greater or lesser extent in determining the extent of affordable housing that is provided. Thus, I can certainly envisage that a VA could be undertaken even after application of the VBC policy in circumstances where the development was still (after application of VBC) not viable. Similarly following the undertaking of a VA, the application of VBC may reduce still further the amount of affordable housing provided on a site. The reality is that both the application of a VA and the application of VBC are both mechanisms which might affect the quantum of affordable housing, but it is only the VBC policy which has been introduced specifically to incentivise brownfield development, and it is necessary to address what that means in the context of any development of brownfield land.

23. In the context of this policy, the incentive for developing brownfield land goes beyond issues of viability. It goes to the manner in which a site will be developed, the specification of the development (for example the standard of the finish), as well as the extent of the development, and the timescale within which the development is commenced and completed. As to the latter point, the availability of VBC may allow a developer to bring the development of a large or complicated site forward quicker than if the funding from VBC was not available. All of the aforementioned points are relevant to the incentives of a developer in the manner in which the development is carried out but it is certainly possible that none of them would make a difference as to the issue of viability. In other words, a development may be entirely viable but a developer is entitled to take the benefit of VBC if it incentivises the development of brownfield land.

Furthermore, and this is important – as set out in my original Opinion at eg, paragraphs 2, 11 and 17 – it is important to draw a distinction between the obtaining of planning permission and the implementation of it.

24. What the Inspector did, however, was to see the application of a VA as effectively a preferred course, or as he described it at DL 36 "an alternative route"; and he considered that the invocation of the VBC policy was only open to an applicant if they had first undertaken a VA. In other words, the Inspector considered that the undertaking of a VA was a required first step before invoking reliance on the VBC policy. That this was the Inspector's approach is underlined at DL 40, the final paragraph of the decision, where the Inspector stated: "I am not persuaded that applying the VBC represents either the only option or the most appropriate way of addressing any issues with this scheme's viability". It is clear from the question which the Inspector posed for himself at DL 20 – whether the invocation of VBC was "the only means" of incentivising the site's redevelopment, that the Inspector misunderstood the distinction between the undertaking of a VA for the purposes of testing viability, and incentivising development for the purposes of the VBC policy.

25. This was an error of law, being a misconstruction and/or misunderstanding of the policy. There is nothing within the PPG or any other national of local policy guidance which requires the prior demonstration of lack of viability pursuant to a VA before VBC can be invoked. As noted above, the invocation of VBC is separate from issues of viability. The determining issue for the invocation of VBC is whether it incentivises brownfield development. As I have noted in paragraph 22 above, that is not solely related to issues of viability but wider considerations of the manner and timing of the development. This will be a matter of fact and degree in every case, but in order to successfully invoke the VBC scheme the developer need do no more than show that it has been incentivised to develop the Site. This may be in any number of ways and for any number of reasons.

26. I have spoken to counsel involved in the Patchetts Equestrian Centre and have been informed that they are proposing to seek permission to appeal against the decision.

Conclusion

27. For the reasons set out in the Summary at paragraph 2 above, the Patchetts Equestrian Centre decision is, in my view, legally flawed.

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