HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Claim No. CO/2454/2021

B E T W E E N:

THE QUEEN (ON THE APPLICATION OF CPRE WARWICKSHIRE)

Claimant

-and-

COVENTRY CITY COUNCIL

Defendant

(1) HALLAM LAND MANAGEMENT LTD
(2) THE TRUSTEES OF THE EASTERN GREEN LANE POOL TRUST

Interested Parties

SUBMISSIONS ON BEHALF OF
THE SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT

Introductions and Scope of Submissions

1. These submissions are made on behalf of the Secretary of State for Housing, Communities and Local Government ("**the Secretary of State**") in relation to a claim by CPRE Warwickshire against Coventry City Council. The order dated 16 August 2021 and made in accordance with the directions of Holgate J required the Secretary of State to file and serve submissions on grounds 1 of the claim *"that is the extent to which the housing mix of a development is capable of being dealt with as a reserved matter following the grant of outline planning permission."* The Secretary of State was not joined to those proceedings as an Interested Party.

2. Accordingly, these submissions focus on the issues raised by ground 1 of the claim, that is the extent to which the housing mix of a development is capable of being dealt with as a reserved matter following the grant of outline planning permission, in the absence of a condition specifically controlling housing mix. Given that the Secretary of State was not involved in the decision-making process for the impugned decision, these submissions do not explore the background to the claim in any significant detail, or deal with the wider merits of the case.

However, the matter to which these submissions respond is one of considerable practical importance.

Issues

3. The claim alleges that Officers misled Members and the Council erred in law in granting Planning Permission without a condition controlling the housing mix. The Claimant does not explain what it means by "housing mix" but appears to be referring to the number of bedrooms within each of the proposed dwellings. It is said that the starting point for the first ground in the claim is that the Council is now not able to control the housing mix that comes forward at reserved matters stage, by virtue of the interaction between sections 92(1) of the Town and Country Planning Act 1990 ("the 1990 Act"), and Article 2 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the 2015 Order"). It is said that housing mix is not a reserved matter, and the same conclusion has been reached by a number of planning Inspectors in planning appeal decisions that the Claimant acknowledges are not binding on the court.

4. The Council's defence on the issue to which these submissions are directed is that conditions 1 and 5 together control reserved matters including scale, appearance and layout which establish parameters of the height and density of development on different parts of the site. It is said at para 13 of the Summary Grounds of Resistance ("**SGR**") that "*since the number of bedrooms in a property is proportional to its overall size, the ability to control the latter means that D can also exercise at least broad control over the former*." The Council considers that it could resist proposals that comprise an undesirable housing mix at reserved matters, and it is said in para 16 that *"since the outline application and permission in this case did not specify housing mix, there is no doubt that it is at least capable of being relevant at reserved matters stage insofar as it can "reasonably be attributed to [scale, layout and/or appearance]"*.

5. The Interested Parties are jointly represented and submit that *"[T]he meanings of "layout" and "scale" are self-evidently broad enough in scope to encompass housing mix. Applying the pragmatism urged in English Clays Lovering Pochin, it is clear that the provision, situation and orientation of houses (layout) readily includes housing mix as a consideration as, in the alternative, does scale (height width and length). It is difficult to see how mix would not encompass consideration of scale and layout, as defined."*[1] Like the Council, the Interested

[1] see SGR/26

Parties consider that size is something that is plainly addressed through the reserved matters of scale, design and layout. Without prejudice to that primary position, the Interested Parties have also provided a draft Unilateral Undertaking that controls the housing mix.

6. The claim gives rise to the following questions:

    a. What is a housing mix?
    b. Can the housing mix or elements of it be regarded as reserved matters for the purpose of the DMPO 2015?
    c. Is a specific condition required to control the housing mix at outline planning permission stage?

Law

7. There is ample authority set out in the grounds before the Court for the principle that where matters have been reserved for subsequent approval the reserved matters application must be within the scope of the outline planning permission (see, for example, the decision of the Court of Appeal in ***Slough Borough Council v Secretary of State for the Environment*** (1995) 70 P. & C.R. 560).

8. Conditions may be applied to a reserved matters approval (***R v Newbury DC, ex p Stevens and Partridge*** (1993) 65 P & CR 438 at 477 *per* Roch J). However, those conditions may not materially derogate from the outline permission already granted. In ***Redrow Homes Ltd v First Secretary of State*** [2003] EWHC 3094 (Admin) Sullivan J stated:

    'A condition may lawfully be imposed upon an approval of details, but its effect must not be such as to amount to a revocation or modification of the "parent" outline planning permission.'

9. If a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition; ***Cotswold Grange Country Park LLP v Secretary of State for Communities and Local Government*** [2014] EWHC 1138 (Admin) following ***I'm Your Man Limited v Secretary of State for the Environment*** [1998] EWHC 866 (Admin), (1999) 77 P & CR 251

10. The definition of reserved matters is 'exclusive' and does not include other matters (see Burton J in ***R(oao Murray) v Hampshire County Council*** [2002] EWHC 1401 (Admin) at [22]).

11. As set out elsewhere in the submissions to the Court, section 92(1) of the 1990 defines an "outline planning permission", and the Article 6 of the DMPO 2015 governs applications for reserved matters approval. Material parts state:

'An application for approval of reserved matters –

(a) must be made in writing to the local planning authority and give sufficient information to enable the authority to identify the outline planning permission in respect of which it is made;
(b) must include such particulars, and be accompanied by such plans and drawings, as are necessary to deal with the matters reserved in the outline planning permission;…'

12. Article 2 of the DMPO 2015 'Interpretation" sets out that:

""reserved matters" in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect of which details have not been given in the application—

(a) access;
(b) appearance;
(c) landscaping;
(d) layout; and
(e) scale;"

13. The article then defines the matters at (a) to (e). The most relevant to this issue are set out below:

"appearance" means the aspects of a building or place within the development which determines the visual impression the building or place makes, including the external built form of the development, its architecture, materials, decoration, lighting, colour and texture;

"layout" means the way in which buildings, routes and open spaces within the development are provided, situated and orientated in relation to each other and to buildings and spaces outside the development;

"scale" except in the term 'identified scale', means the height, width and length of each building proposed within the development in relation to its surroundings;

14. The concept of "scale" as a reserved matter under article 1(2) of the Town and Country Planning (General Development Procedure) Order 1995, as amended, was considered by Simon J., as he then was, *in* ***MMF (UK) Ltd. v Secretary of State for Communities and Local Government*** [2010] EWHC 3686 (Admin). Simon J. observed (in paragraph 11 of his judgment) that "*at the most simple analysis, if one considers a building as a simple three-dimensional shape, a box, the size of the box, and importantly its relationship with other buildings, is a question of Scale*". Simon J also had regard to guidance from the Chartered Association of Building Engineers setting out the following in respect of "scale" at [12]:

"Scale: height … is the size of a building in relation to its surroundings … Height determines the impact of development on views, vistas and skylines.

Scale: massing — the combined effect of the arrangement, volume and shape of a building … in relation to other buildings."

15. At [8] the Judge drew a distinction between "scale" and "appearance":

"It can be seen that the terms "Scale" and "Appearance" are concerned with different matters. Scale is concerned with the physical relationship of the proposed development to its surroundings; how does its size relate to adjacent buildings? Appearance is potentially a wider definition, and covers most physical aspects of the proposed development. The reference to "the visual impression of the building" might seem from the definition to include its physical relationship to other buildings; however, since scale covers that quality, at least as a matter of impression, Appearance must exclude issues of height, at least as far as it is concerned with the building's physical relations with its surroundings."

16. The matter of "layout" was addressed to some extent in ***R(oao Denbighshire CC) v Welsh Ministers*** [2017] EWHC 3219 (Admin) in which the local authority granted planning permission for an unspecified number of dwellings. HHJ Jarman QC dismissed an appeal seeking to quash the Inspector's decision which concluded that the housing density and mix could not be controlled through the reserved matters of layout and scale.

Submissions

What is a housing mix?

17. It is useful to explore the concept of "housing mix" before considering whether the mix or its constituent parts are capable of being controlled through reserved matters. There is no definition of the term "housing mix" within the 1990 Act nor the DMPO 2015, and the term is not included within the definition of reserved matters. There is no definition of the term in national planning policy. The National Planning Policy Framework ("NPPF") in force at the time of the decisions (now superseded but in identical terms) required that strategic policies should be informed by local housing needs assessment, conducted using the standard method set out within planning practice guidance, to determine the minimum number of homes needed in an area, and within that context "*the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies (including, but not limited to, those who require affordable housing, families with children, older people, students, people with disabilities, service families, travellers , people who rent their homes and people wishing to commission or build their own homes).*"[2]

18. The NPPF is not prescriptive as to the particular housing mix to be provided for any development but leaves that matter for individual planning authorities to determine based on their understanding of evidence of need in the area.

19. In this case, the relevant policy is Policy H4 of the Coventry City Council Local Plan[3] which states that:

"The Council will require proposals for residential development to include a mix of market housing which contributes towards a balance of house types and sizes across the city in accordance with the latest Strategic Housing Market Assessment."

20. The explanatory text refers to the greater need for larger homes and explains that the Council considers it is particularly important that strategic sites provide the full range of housing to meet assessed needs, including a variety of housing types and sizes. Accordingly, it appears that the term "housing mix" is used to refer to matters beyond the number of bedrooms to be provided in each dwelling, such as type and tenure.

[2] NPPF paragraphs 60 & 61, now 61 & 62
[3] Claim Bundle at page 261

21. Without a comprehensive audit of development plans and supplementary planning documents, it is difficult to fully explore the nuances that will inevitably arise in different local authority areas as to what is meant by the term "housing mix". It will depend on the specific policy or guidance adopted by each local planning authority, which may or may not be prescriptive as to the particular mix that is appropriate for each development site. It does appear however that size, type and tenure can all be regarded as elements of a housing mix, and that "size" encompasses the number of bedrooms to be provided in a dwelling.

Is the size or number of bedrooms per dwelling a reserved matter within the meaning of DMPO 2015?

22. It is assumed that the Claimant's complaint is confined to the issue of "size" as part of the housing mix which it equates with bedroom numbers per dwelling. There are no submissions on the issues of "type" or "tenure". The Claimant's central submission is that if a Council wishes to control the number of bedrooms per dwelling at reserved matters stage, it must impose a specific condition on the outline planning permission. The Secretary of State agrees.

23. On a straightforward reading of the definitions and having regard to the case law where relevant, "appearance" does not appear to encompass the matter of size, and nor does it relate to the number of bedrooms per dwellings.

24. The size of individual dwellings may well be a factor in a site's "layout" albeit the definition concerns the interaction of building and spaces rather than the physical dimension of those individual components. Moreover, there is a difference between layout and scale such that size of the buildings is more appropriately encompassed within the reserved matter of "scale"; see ***MMF (UK) Ltd*** .Neither the definition of layout nor scale refers to housing mix, or bedrooms per dwellings.

25. The matter of "scale" obviously encompasses "size" since it relates to the physical dimensions of each building. As a matter of common sense, there is likely to be a correlation between the size of a dwelling and the number of bedrooms it has that might be readily understood on the face of a reserved matter application, particularly one that proposes standard house types. However, the relationship will not always be consistent, and there may be many exceptions to the rule, if it can even be regarded as a rule. It is also noted that "scale" refers to "each building". There may be some buildings where the relationship to the number of bedrooms within it is impossible to predict or understand from the external dimensions, for example, in respect of

flats, or shared accommodation. The definition of "scale" within the DMPO 2015 does not concern the internal configuration of buildings, and nor does it relate solely to dwellings.

26. It is submitted therefore, that while "scale" clearly encompasses the size of dwellings, it does not relate to the mix of the number of bedrooms per dwelling.

Is a specific condition required to control the housing mix (bedrooms per dwelling) at outline planning permission stage?

27. If a Local Authority considers it necessary to make the development acceptable in planning terms that the housing mix, and more specifically the bedrooms per dwellings on site should be secured, then it should do so by condition or some other mechanism, such as a section 106 planning agreement at outline stage. A failure to impose such a condition in the absence of any other mechanism on the outline permission would engage the principle enunciated in ***Cotswold Grange Country Park LLP,*** and a local planning authority could not then insist on a particular mix at reserved matters stage.

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6 September 2021