APP/E2205/W/23/3320146
APPEAL BY PENTLAND HOMES LTD/ MALCOLM JARVIS HOMES LTD
SECTION 78 TOWN AND COUNTRY PLANNING ACT 1990

LAND AT POUND LANE, MAGPIE HALL ROAD, BOND LANE, ASHFORD ROAD, KINGSNORTH, KENT

COUNCIL'S CLOSING STATEMENT

Introduction

1. These closing submissions are unusually brief. Why? The Council, as stated in opening, supports the development of the appeal site in accordance with policies S4 and S5 of the Ashford Borough Local Plan 2030 ("the Local Plan"). The delivery of housing on this strategic site is important to the Council and would deliver significant new housing in a sustainable location.

2. As a result, the Council resolved to grant planning permission for the development, initially in 2018, and then more recently in July 2023, after this appeal had been made, the Council determined that had it been decision maker, it would have granted planning permission subject to the execution of a section 106 agreement on terms identified in the officer report, conditions and the carrying out of an Appropriate Assessment.

Remaining issues

3. The issues between the parties have narrowed during the course of the inquiry. The remaining issues relate to the three requests that the Appellant has made for the Inspector to strike out certain obligations within the section 106 unilateral obligation ("the UU") (see clauses 2.7.1, 2.7.2 and 2.7.3).

Clause 2.7.1 – Quality Monitoring Fees

4. The Inspector asked Ms Tomlinson ("FT") directly whether or not the Quality Monitoring Fees were necessary to make the proposed development acceptable. Fairly, having already explained that these fees are to ensure that the delivery of the development achieves the high-quality design standards sought for it, she said no. In light of which the Inspector can properly strike out that obligation, comprising specifically paragraphs 2.5, 2.6 and 2.7 of Schedule 1 to the UU.

Clause 2.7.2 – Custom and Self Build ("CSB") units

5. Policy HOU6 of the Local Plan requires eligible sites to supply no less than 5% serviced dwelling plots for sale to CSB. This would equate to 28 units. The Appellant is now offering 5 units. This is based on the level of demand as indicated by the Custom and Self Build Register. However, as explained by FT, that register is not definitive as to demand as of now, and cannot reflect the demand in the future when the units are to be brought forward. The 5% figure is contained within a relatively recently adopted development plan policy and was justified on the underlying evidence base.

6. The policy includes provision that where plots have been marketed for sale to CSB for a period, and have not sold, the plot can return to the developer to be developed and sold as open market housing. This is reflected in the UU at paragraph 7.7 of Schedule 3 Part 1 of the UU. This provides the Appellant with flexibility in the case where there is no, or insufficient, demand at the time the plots are brought forward.

7. Moreover, the actual justification put forward by the Appellant for moving away from policy HOU6 is viability. This is unsustainable given the agreed maths. Mr Hegan ("TH") [TH p/e, §§6.1-6.2] demonstrates that including an additional 24 CSB plots would reduce the residual land value of the scheme by approximately £263k. In the context of a £20.5m deficit, TH agreed in XX this figure was equivalent to a rounding error. It is plainly not significant in terms of viability.

8. It should also be noted that as all the CSB plots are delivered in Phase 1, they would not form part of the VR and as such any additional profit made by them becoming open market units would be wholly to the benefit of the Appellant.

9. For this reason, the Council's position is to be preferred and there is no good reason to move away from the policy position. The Inspector is invited to elect the 28 unit Option B in paragraph 7.1 of Part 1 of Schedule 3 to the UU, by striking out Option A (5 units only).

Clause 2.7.3 – Viability Review

10. The most important remaining area of disagreement is whether or not there should be a viability review ("VR") for the purpose of maximising affordable housing delivery. The answer is a simple yes for the following reasons:

    (i) As John Collins ("JC") agreed in XX, there is an explicit, detailed policy basis (HOU1 and IMP2) for a review mechanism. It is noteworthy that neither policy in any way envisages a large deficit as being a justification for not having a VR;

    (ii) It is agreed that policies HOU1 and IMP2 incorporate flexibility to best ensure affordable housing is actually delivered (JC in XX);

(iii) Flexibility is a two-way street: it allows the Council to accept a lesser amount of AH than that required by policy, but if market conditions change then it is entirely reasonable to ask the Appellant to flex too – the Local Plan Inspector certainly thought so in finding that the policy underpinning viability reviews was sound;

(iv) Moreover, as JC agreed in XX, the purpose of policy HOU1 is to maximise AH [CD.7.1, PDF p.221, §6.17]. A VR is entirely consistent with that underlying purpose;

(v) All the more so, where the Appellant opened the inquiry emphasising the extent of the AH backlog (OS, §7) (approximately 2,000 units) and, indeed, as JC agreed in XX, the Local Plan does not set out to meet all of the identified AH need (the need alone would justify a policy asking for 50% AH) [CD.7.1, PDF p.219, §6.2];

(vi) JC confirmed in XX that the key concern the Appellant has with a VR is, less the principle of a VR, and more the concern that it would cause delay, but that concern is simply not substantiated by the evidence:

a) TH sets out an analysis in his rebuttal evidence [TH R, §6.9] that suggests that there will be no delay in the delivery of housing. His evidence is that there will be a 3-month buffer between securing reserved matters for the final 150 dwellings, following a VR, and "running out" of units which have already been fully consented to build. This high point of the Appellant's case does not therefore substantiate delay.

b) Further, this high point is based upon the delivery of 100 units per annum which TH confirmed was based on two outlets. Each outlet would have to be pushing out units at a reasonably high pace to hit 100 units collectively. The site next door (Chilmington Green) has not achieved this, as TH affirmed in XX. If in reality (as opposed to what is agreed for the purposes of the viability assessment), the pace is less then 100 units per annum, then there will be an even greater buffer of time to undertake a VR and obtain RMs prior to running out of fully consented units. The truth is that the Appellant's evidence does not substantiate its main concern with the principle of a VR.

c) Moreover, in reality the Appellant is asking for eight years (96 months) to apply for the final reserved matters, which is nearly 5 years beyond TH's assumed timescale for such application [TH R, Appendix 2, Scenario 1]. That suggests there is potentially very significant lag on the build timetable, putting TH's 3-month buffer in

the shade, and indicates the concern about delay caused by the VR-related obligation to be more notional than real.

(vii) The last point that has been focused upon by the Appellant is whether or not there is a reasonable prospect of the VR mechanism delivering further AH. The following should be noted:

a) In XX of AL he agreed that the test was whether or not there is a reasonable prospect of the VR mechanism delivering further. A note of caution. The appropriate test is a matter of law rather than expert evidence. The test, ultimately, is section 38(6). It is a matter of judgment for the decision maker whether there are material considerations that indicate conflict with the development plan can be overcome. The starting point is the policy. The question is whether to move away from it having regard to material considerations. The prospects of the VR mechanism delivering AH is a relevant consideration, not the test;

b) Putting that aside, as all agree, the future is uncertain. The very purpose of the VR is to manage that uncertainty. In XX Mr Leahy ("AL") was taken to task for only providing one future scenario and then over the detail of it, but the reality is that there is no substantive evidence before the inquiry about future market conditions at any particular point in time and particularly over the 8-year period currently sought, precisely because it is the future. As AL put it, the scenarios are infinite. The need for a viability review is no better demonstrated by the difference between the deficit in AL's original report on this scheme [AL p/e, App A, p.23, §9.5] where he shows a deficit of £9.7M and TH p/e, §6.2 where he shows a deficit of £20.3M on a very similar scheme scope. The difference is mainly driven by variance in the section 106 costs and increased build costs, whilst values remained constant. All this happened in 4 months. What couldl happen in 2-3 years? We simply do not know.

11. Put shortly, the VR: has a policy footing which has been found to be sound; it is designed to manage future uncertainty; and is fundamentally important in a situation, as here, where there is substantial AH need and it is an express policy objective that the delivery of AH is to be maximised.

12. Allied to this, the Appellant's principal concern is that a VR mechanism might cause delay to actual housing delivery, but that concern does not arise on TH's evidence – he shows a 3-month buffer – and certainly does not if eight years is required for the final RM application.

13. There is a number of further points that should be borne in mind:

(i) Stepping back from it all, the Appellant is here because it believes it can deliver the housing and/ or sell the land at a profit. Indeed, as TH said in XX, the viability deficit does not mean that the developer does not make any profit. Indeed, TH's analysis shows the developer making a profit as the deficit stands (see [TH p/e, Appendix 2, Tab 1a] which shows a 9.3% return on GDV when providing 10% AH; 28 CSB and the Council's 106 contributions). The scheme is currently profitable. Paragraph: 009 Reference ID: 10-009-20190509 of the NPPG on viability states "*review mechanisms are not a tool to protect a return to the developer, but to strengthen local authorities' ability to seek compliance with relevant policies over the lifetime of the project*". It is the developers profit that ought properly to flex, not the provision of what all parties agree is vitally important – AH.

(ii) The VR also needs to be seen in the context of the flexibility that the Council has adopted in agreeing with the Appellant that they can build up to 400 units (out of 550) before any additional affordable housing is required to be delivered, and that the VR happens only after the occupation of 100 units. Using TH's sales trajectory of 100 units per annum, this means they have three years to agree the VR, organise a land sale of the final 150 units, clear reserved matters and get on site delivering. In short, this is not a VR of the scheme as a whole, but of only the latter part of it. The Council has cut its jib in a plainly proportionate way seeking to manage the need to deliver houses but also to ensure so far as possible they are the right tenure.

14. For these reasons, we invite the Inspector <u>not</u> to exercise the strike-out clause in regard to the obligations in Schedule 3 Part 2 to the UU. It is very important not only that housing is delivered on site but that it is in so far as possible the right housing. The delivery of AH is enormously important, on both parties' cases, and supported by robust evidence of need. The limited VR is plainly proportionate to that aim.

<u>Nutrient Neutrality</u>

15. The Council has confirmed in a note to the inquiry that following correspondence from Natural England and having read and now heard the evidence on this issue before the inquiry, the Council has not sought to challenge the Appellant's conclusion on current land use and, as a result, the conclusion that it can be concluded that there is no impact on integrity on the Stodmarsh SAC.

<u>Conclusion</u>

16. For the reasons set out above, the Council invites the Inspector to grant planning permission and in doing so to include (by refraining from striking out) the VR

mechanism, and to elect 28 CSB to five, by striking out Option A (5 units) in paragraph 7 of Part 1 to Schedule 3 of the UU.

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