Neutral Citation Number: [2022] EWHC 2039 (Admin)

Case No: CO/2553/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before:

THE HONOURABLE MR JUSTICE DOVE

- -

Between:

The Queen on the application of Village Concerns	**Claimant**
- and -	
Wealden District Council	**Defendant**
-and-	
(1) Swansea Enterprises Corporation	
-and-	
(2) Secretary of State for Levelling Up, Housing and Communities	**Interested parties**

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Ms Jenny Wigley QC (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Richard Moules (instructed by **Legal Services Manager of Wealden District Council**) for the **Defendant**
Mr Christopher Boyle QC and Mr Luke Wilcox for the **First Interested Party** (instructed by **BDB Pitmans**)

Hearing dates: 24 May 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 10am on 29 July 2022. I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Dove :

Introduction

1. On 11th June 2021 the defendant granted planning permission for demolition of an equestrian worker's dwelling, stables and horse walker and change of use of equestrian land to provide up to 205 C3 dwellings (including 35% affordable provision), access, landscaping and other associated infrastructure at Hesmonds Stud, Waldron Road, East Hoathly, East Sussex. The application was in outline and granted subject to numerous conditions and the terms of a planning obligation under section 106 of the Town and Country Planning Act 1990. The first interested party was the applicant for the planning permission. The claimant is an unincorporated residential association that is formally constituted, and which was set up for the purpose of protecting the parish of East Hoathly and Halland from over-development as well as to protect the historic character and ambience of these villages. The claimant participated in the planning application process raising objections which are detailed so far as relevant in due course in this judgment.

2. This application seeks a judicial review of the decision to grant planning permission on two grounds which are set out below. It seeks the quashing of the decision to grant planning permission. I am grateful to the legal teams on all sides of the case for the assistance which they have provided in carefully preparing the necessary papers for the case which greatly assisted in the conduct of an efficient hearing. I am also grateful for the focused and helpful submissions of all counsel in the case. Ms Jenny Wigley QC appears on behalf of the claimant, Mr Richard Moules appears on behalf of the defendant and Mr Christopher Boyle QC and Mr Luke Wilcox appear on behalf of the first interested party. All references to submissions made by the parties in the following judgment should be read accordingly.

The application

3. The nature of the application and the development applied for has been set out above. The application was supported by a package of documentation which included a Design and Access Statement and a Planning Statement. The Planning Statement contained an explanation of the mix of dwellings which were proposed (which was also reflected in the Design and Access Statement) in the following terms:

> "4.6 The proposal would make provision for a number of different house types to reference the variety found within East Hoathly and to avoid the development adopting a bland and homogenous appearance. The mix of dwellings is shown in the table below.

Unit Type	Number of Units
1 & 2 Bedroom	36

2 Bedroom Specialist	5
3 Bedroom	122
4 & 5 Bedroom	42
Total	205

Table 1: Schedule of Accommodation

> 4.7 The majority of dwellings proposed feature 3 bedrooms. This type of accommodation is more flexible and allows young families to move in and grow in those. The proposal also offers No.36 1 and 2 bedroom dwellings in which are appropriate for older people to downsize to. Further, there are comparatively very few large dwellings with just No.42 units having four or five bedrooms. Bungalows have also been included in the proposal to house older residents or potentially those with disabilities."

4. These figures in relation to housing mix were only proposed indicatively as part of the outline application. As set out above, the claimant raised objections on numerous topics in relation to their concerns about the impact of the application. In particular, at paragraph 4.15 of their objections dated 13th January 2017, they sought to rebut the contention made on behalf of the first interested party that there were relatively few large dwellings comprised within the mix having four or five bedrooms by referring to a recent survey of community opinion on the type of housing preferred. They argued that the survey did not support the provision of 42 four and five bedroom houses within the development which, at 20% of the development, they contended could not properly be described as comparatively very few. Again, at paragraph 6.1 of the same document they reiterated the point that 20% of the homes having four to five bedrooms was not what the community wanted as demonstrated in the recent village survey.

5. Others who were consulted in relation to the application included Historic England and the defendant's Conservation Officer. Both of these consultees provided a detailed examination of the impact of the proposals upon the historic built environment, and in particular the East Hoathley Conservation Area and listed buildings in the vicinity of the site. Historic England formed the view that the proposed development would cause a high level of harm to the interests of the historic built environment and therefore there was a conflict with policy (in particular that

contained in the National Planning Policy Framework ("the Framework")). They objected to the application as it was presented, but in passing they remarked that a much smaller scheme utilising only a part of the site might be feasible subject to appropriate design. The Conservation Officer also objected to the planning application on the basis that harm, albeit less than substantial harm, would be caused to the interests of the historic built environment by the application proposed. Again, like Historic England, the Conservation Officer considered that there could be scope for a far smaller development subject to appropriate detailing.

6. These and other consultation responses were brought together in an officers' report in respect of the application for consideration by the Planning Committee who were going to determine the application at their meeting on 16th July 2020. It was recommended that, subject to conditions and the completion of a satisfactory planning obligation, planning permission should be granted.

7. The officers' report contained comments from the defendant's Landscape and Arboricultural officer. This officer made specific observations in relation to a number of specified trees and hedgerows and drew attention to an area of Ancient Woodland at Alders Wood, to the north of the site, as well as another area of Ancient Woodland at Moat Wood to the south of the site. The Landscape and Arboricultural officer suggested that consideration "should be given to a more sensitive site layout that aids retention in full or at the very least reduces fragmentation to a minimum and maintains linear connectivity across the site". The officer considered that suitable mitigation in relation to a number of identified hedgerows and trees could be conditioned as part of any planning approval. In respect of Alders Wood, the officer noted that in the illustrative plans a new road was proposed to run parallel with the woodland edge without any buffer zone. The officer drew attention to the need to establish a 15m buffer zone as a minimum around this area of Ancient Woodland in line with guidance from the Forestry Commission and Natural England. The Landscape and Arboricultural officer therefore suggested amendments to the scheme layout to allow retention of significant and high quality arboricultural features (as detailed in the objection) as well as the establishment of a minimum 15m buffer zone around the area of Ancient Woodland at Alders Wood. Draft condition 32 contained within the officer's report comprised a requirement for a scheme to provide a minimum width of 20m from the canopy edge of Ancient Woodland areas to be submitted and approved in writing prior to the commencement of development.

8. The officers' appraisal of the proposal commenced with setting out the relevant policies from the development plan in respect of the proposal, as well as those contained within the Framework. This list of policies included policy AFH1 of the adopted Affordable Housing Delivery Local Plan 2016 which is set out in full below. The officers' report went on to examine housing land supply and identified that at the time of the report the defendant could only demonstrate a 3.67 years supply of housing land, short of the 5 year supply of housing land required by paragraph 73 of the Framework, and that, on the basis that the exceptions within footnote 6 of the Framework were not engaged, the presumption in favour of development applied, and the application was to be considered applying the tilted balance contained within paragraph 11d of the Framework.

9. Of particular relevance to the present case, the officers' report also examined the question of design density and layout and contained the following opinion:

> "Design, Density & Layout
>
> As an outline application with all matters reserved other than access to the site (i.e appearance, landscaping, layout and scale), the position of particular buildings, internal roadways or proposed planting are all matters for later consideration. In terms of these aspects, this application simply has to satisfy one basic test- can the quantum of development proposed, accessed from the location(s) detailed, be adequately accommodated within the constraints of the site?
>
> The indicative plan and associated reports provided with the application detail one potential layout for the site, in order to try to satisfy this basic test. In its most basic form this plan demonstrates that 205 dwellings can be accommodated without any unacceptable impacts on neighbouring properties, treed boundaries of the site, or the wider area."

10. The officers' report concluded that the submitted application met fully the requirement set out in policy AFH1 of the Affordable Housing Delivery Local Plan ("The AHDLP"). Whilst the application was in outline, the exact position, size and design of the affordable units were not known at that stage, but these were matters which could be approved in detail through the imposition of a planning condition and during the consideration of reserved matters applications. In respect of tree and landscape proposals it was noted that detailed landscaping proposals were reserved for later consideration but that "the indicative layout demonstrates how the vast majority of existing trees and landscaping at the site, including the ancient woodland to the northern boundary, could be retained and supplemented by new planting and where necessary protected by appropriate buffer zones". The comments of the Landscape and Arboricultural officer were noted, and it was considered that "these issues can clearly be overcome during the [reserved matters] stage".

11. The officers report set out the overall planning balance in relation to the application in the following terms:

> "Planning Balance
>
> The proposal seeks permission for up to 205 dwellings in a location, beyond any development boundary in the adopted development plan. The weight to be given to the conflict with the Council's development strategy is substantially reduced due to considerable shortfall in housing land supply.
>
> Set against that conflict are the social benefits of addressing the under supply of housing in the District. The delivery of housing is a material consideration in the context of the very significant current housing land shortfall. This includes market, greater choice, together with affordable and custom and self building units.

The development also includes the introduction of open space accessible to future residents of the application site, including the introduction of equipped play areas. These would serve to enhance access for recreational purposes promoting the wellbeing of the local population.

In terms of the wider economic role, the development would contribute towards economic growth during the construction phase. The additional population would assist the local economy and help support the sustainability of local services and facilities in the area.

In meeting the environmental role the loss of the existing fields to development will have a permanent impact on the character of the immediate locality, but the change is not considered to be harmful to the landscape character, provided the development is set back from the northern boundary and appropriate structural planting and buffer planting are incorporated into the scheme design, and sufficient landscape buffer is provided along the eastern boundary. The long term management of these areas would improve the biodiversity of the location. Through the landscape and environmental enhancements and the ecological mitigation proposed, these factors would positively contribute to the overall sustainability of the application site.

…

The separation distances between the existing and proposed dwellings, combined with the proposed landscaping, would be determined through the subsequent submission of reserved matters to protect the living conditions of neighbouring residents and avoid prejudicing development on adjoining land.

…

Officers are of the view the clear public benefits of the proposal would outweigh the less than substantial harm to the significance of a designated heritage asset.

There is no conflict with designated European sites. Natural England do not object and an Appropriate Assessment can be positively concluded.

The tilted balance in paragraph 11 of the NPPF is engaged because firstly, policies that are most important for the determination of this application are out-of-date and secondly, the Council cannot demonstrate a five year supply of deliverable housing sites.

> Balanced against the identified conflict with the development plan the committee should give substantial weight to the provision of up to 205 dwellings, within 72 affordable dwellings and 10 units of custom or self build plots. All on a site that is functionally well related to the existing village. Paragraph 59 of the NPPF states that to support the Governments objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay. This comprises a substantial social benefit."

12. In the light of this analysis the officers concluded that the application should be approved subject to the imposition of conditions and the completion, as set out above, of a satisfactory planning obligation.

13. In the papers before the court there is a transcript of the debate at the Planning Committee meeting which ultimately resolved to grant planning permission. During the course of the debate one of the members, Councillor Watts, asked the officer who was presenting the report to the committee, Mr Robins, whether there was any possibility that the site could be reduced to provide a larger buffer zone between the boundary of the site and the boundary of the conservation area. Following other interventions by committee members Mr Robins rounded up a number of these points in providing a full response to the committee members in respect of their observations. Mr Robins provided as follows:

> "And I think Councillor Watts said, is it possible that the site be reduced to ease it away from the boundary. And there's a couple of issues there and there is a parallel with the comments in the update report about a reduced scheme that Historic England asked about and also the Conservation Officer and the legal submissions that criticised the report, that a smaller scheme has not been considered. The site area is the site area, it hasn't been amended other than the withdrawal of the Ailies Lane component of the scheme, so the red line area does include up to the boundary with the Conservation Area and has not changed in that regard.
>
> But then, as we now know or we do know as a Committee, it is an up to number, you know, it's not fixed at 205. The reserved matters will inform that, and it could be fewer units once you take into account the constraints. I have to say I think it probably will, because, as the Committee know, there are other site-specific constraints, ancient woodland buffers, upgrades to the public right of way, this business of the sustainable drainage which I've just talked about. When we glue those all together, including those natural features which I spoke to on the presentation, and you take those into account, I don't think

> it would be a 205-unit scheme, it will be fewer. But we will get into Councillor Watts nitty-gritty points as part of reserved matters. It ought not to necessarily inform the principle of development at this stage."

14. This theme was then picked up later on in the debate by the chair of the committee who made the following observation:

> "I'd just like to come in here with regard to the up to 205 figure. It is very clearly an up to and, Mr Robins, you've already said that there will be lots of constraints which will bring that number down quite considerably and I note from Parker Dann Hannah Ronan's submission that she talks in her fourth paragraph that there is significant scopewhat (sic) the committee might for an alternate layout to provide relief to the heritage matters at reserved matter and indeed our own Officer, in her lengthy, lengthy report, states fairly early on that she – she states there is scope in investigating a small – a far smaller development area, and in her fifth paragraph states she would be pleased to work closely with the applicant and our Officers to try and achieve the most appropriate layout.
>
> So we do have it from these other people that they were aware that the 205 figure is something not quite plucked from the air but that it is unlikely to be achievable and it is regrettable that the agents, having withdrawn part of the application, did not see fit to come in and make it clearer for everybody, but I think we're all clear exactly what is proposed and we're all clear that 205 is unlikely to be achieved."

15. Immediately prior to putting the officers' recommendation to the vote, one of the members, Councillor Snell, sought further clarification of "the fact that the application is up to 205 and that there is scope during the reserve matters discussion for there to be further consideration to the layout so that heritage sites are not encroached". There was some discussion about whether encroached was the correct word to use, and it was thought that sympathetic would be more appropriate. Mr Robins was asked if he "wouldn't mind coming in here and just clarifying and putting into planning speak what Councillor Snell has précised". Mr Robins said as follows:

> "Well, Chairman, I think what the Committee might do in the circumstances is instruct me and Officers to explain in the decision notice that the layout is purely illustrative and is not to be regarded as approved, that further work is required and that the reserved matters should be properly informed by all of the constraints, having regard to the setting of the listed buildings and the setting of the Conservation Area, so we're really laying down a marker that this – as you said in the discussion, Chair,

> the agents have said there is scope for a different layout, the scheme is up to, if we don't like a reserved matter, assuming outline is granted, then we can withhold the reserved matters if we're unhappy with how that manifests itself on the ground and with all those reserved matters that come forward via another application."

16. Following Mr Robins' contribution, a vote was taken and the outline application for up to 205 houses was approved.

Planning policy

17. As set out above, as part of the officers' report the operative and applicable planning policies were set out and listed for the purposes of advising the Planning Committee members. For the purposes of this judicial review the issues in respect of ground 1 are focused on the defendant's statutory development plan, and in particular policies relating to housing mix within residential developments. The first element of the development plan to which reference has been made in this case is the Core Strategy Local Plan (the "Core Strategy") which contains the following material in relation to the issues in this case:

> "Housing type and size.
>
> 7.7 Although the new homes proposed to be allocated under our Core Strategy will represent a relatively small proportion of the total housing stock in Wealden it is important to ensure that the types and sizes of new dwellings match as far as possible what is needed locally. We wish to give clear guidance to house builders so that provision can meet our objective to ensure that new homes provided address the needs of local people and of those moving to the area, particularly people of working age. It is important for developers to appreciate the purpose of housing development in a particular area so that the best fit can be achieved with what is needed locally. It will also be necessary through subsequent DPDs to provide policies to protect our overall housing stock and allow changes to existing housing stock, including the loss of dwellings and changes in types and size of dwellings where appropriate.
>
> 7.8 We have identified local need by examining demographic trends and by using the results of the Wealden Housing Market Assessment. Projections show that across Wealden there will be a growth in numbers in the older age groups (from age 50 and above) and in the number of single-person households. The relationship between household size and the type and size of dwelling is not a straightforward one. For those single or couple households that can afford to buy their own home it should not be assumed that they will want a small flat or house. Overall, the Strategic Housing Market Assessment suggests that there should be an emphasis on the provision of larger but modest family properties in south Wealden, and a range of

smaller units in north Wealden, on a number of different sites, to improve both affordability and choice. In south Wealden a focus on semidetached and detached housing is appropriate and will help broaden the areas housing stock, making it generally more attractive to working age families moving from elsewhere. Further information provided in Background Paper 2.

7.9 The Strategic Sites and Delivery and Site Allocations DPDs will provide detailed policies regarding housing mix and design, densities and standards of design including lifetime homes, accessibility for wheelchair users and parking standards.

Affordable housing

7.10 The significant extent of local housing needs is set out in accompanying background papers. Similar to other areas of the South East, Wealden is an area of relatively high housing demand and high levels of owner occupation. Although there are quite marked variations in house prices between different parts of the District, there is a general consequence that many first-time buyers, key workers and lower income households find it extremely difficult to gain a foothold in the local housing market.

7.11 In 2009, the Council commissioned a housing needs survey concerning the nature and extent of our local housing need. This has confirmed an annual affordable housing need of 812. Even when re-lets and alternative mechanisms of meeting housing need are taken into account this figure is substantial, and is not deliverable or sustainable in the context of planned housing delivery rates. However, this mismatch nevertheless highlights the importance of delivering the maximum number of affordable dwellings from new housing growth that will take place over the plan period.

7.12 We have also commissioned specialist research which has looked at the viability of affordable housing provision within Wealden. This has demonstrated that although it is not viable for all new housing developments to accommodate affordable homes, there is potential to provide an element of affordable housing. That evidence also confirmed that the potential viability of housing sites in the central and northern parts of the District could support a higher proportion of affordable housing than most locations in the south of Wealden. In this respect, sites allocated in the Site Allocation DPDs will normally have a requirements for a higher proportion of affordable housing than the overall District target, in accordance with the Wealden Affordable Housing Viability Assessment, where these sites are located in the central and northern parts of the District.

7.13 The Council has identified that the provision of affordable housing is a high priority policy objective. However, we recognise that site and market conditions can vary both between sites and in certain circumstances, particularly where abnormal costs or other circumstances apply, it is possible that there may be viability issues on specific sites. Where it can be proven that affordable housing cannot be achieved, due to economic viability, we are required to be flexible in terms of meeting stated targets. In such exceptional circumstances, it will be the responsibility of the developer to provide substantial and verifiable evidence to demonstrate that the requirements of Policy WCS8 cannot be met. This will need to be tested by means of a rigorous site specific economic viability assessment based on an "open book" approach and used to determine a revised appropriate level of provision.

WCS8 Affordable Housing

New housing developments will be expected to provide for a mix of dwelling size, type and tenure that meet the identified housing needs of the community.

The Council will require affordable housing on sites of 5 or more dwellings (net) or on sites of 0.2 hectares or more. Affordable housing will be required at a level of 35% of the number of dwellings in any scheme. Where sites are allocated in a site allocations Development Plan Documents, that document may specify a different, and potentially higher, housing target, having regards to the findings of the Wealden Housing Viability Assessment and site specific considerations.

Affordable housing provision should incorporate a mix of tenures. The Council will negotiate the exact tenure split on each site. However, the presumption is that around 80% of the total number of affordable homes provided will be for social rented accommodation with the remainder being for intermediate accommodation.

Where it can be proven that affordable housing cannot be achieved, due to economic viability, there will be flexibility in meeting stated targets. In such exceptional circumstances it will be the responsibility of the applicant to demonstrate that the requirements of the policy cannot be met and the closest alternative target that can be achieved taking into account viability and need.

The affordable housing will be integrated into the development and be indistinguishable in design terms from the market housing on the site.

> Affordable housing should be delivered on site, however, in exceptional circumstances Wealden District Council will accept a commuted sum or free serviced land in lieu of on site provision. These circumstances may include provision where a Registered Provider finds it uneconomic or impractical to provide the units in the scale or form agreed. Any financial contributions will be pooled and used to enable affordable housing within Wealden District.
>
> 7.14 Advice on the detailed operation of this policy, the definition and nature of local housing needs to be met, and the mechanisms for delivery of affordable housing will be set out in a supplementary planning document."

18. The second element of the defendant's development plan which is pertinent to the issues which are before the court is the AHDLP which was adopted in May 2016. The introduction to the AHDLP provides as follows:

> "Introduction
>
> 1.1 This document is the Affordable Housing Delivery Local Plan, which reviews the Wealden District (Incorporating the South Down National Park) Core Strategy Local Plan Policy WCS8 concerning affordable housing. This Local Plan is limited to affordable housing provision and the adopted Core Strategy Policy WCS8 concerning affordable housing, and does not affect any other Core Strategy policy.
>
> 1.2 The Policy within this document relates to the area of Wealden District which does not include the South Downs National Park. The adopted Core Strategy Policy WCS8 relating to Affordable Housing will therefore remain relevant for the part of the South Downs National Park which is within Wealden District, until it is superseded by a relevant Local Plan produced by the South Downs National Park Authority. Any reference to District in this Plan means Wealden District excluding the area within the South Downs National Park"

19. Under the heading of Affordable Housing Policy the AHDLP notes that, in common with other areas of the South East, Wealden District is an area of high housing demand and high levels of owner occupation, and that there are marked variations in house prices, with a general consequence that many first-time buyers, key workers and those in lower income households find it difficult to find a foothold in the local housing market. The explanatory text goes on to reference the housing needs survey from 2009 referred to by the Core Strategy as well as the research relating to viability issues. The text, and the accompanying policy, then provide as follows:

““**2 Affordable Housing Policy**

…

2.4 In accordance with the National Planning Policy Framework, the Council is seeking through the provision, distribution and design of affordable homes to create sustainable, inclusive and mixed communities. Of importance is the need to ensure that within any scheme that the affordable homes are integrated and not segregated from the market homes, in order to promote inclusive and mixed communities. This will be an important factor in the overall design of the development on site.

2.5 The Council has identified that the provision of affordable housing is a high priority policy objective. However, it is recognised that site and market conditions can vary both between sites and in certain circumstances, particularly where abnormal costs or other circumstances apply, it is possible that there may be viability issues on specific sites. Where it can be proven that affordable cannot be achieved, due to economic viability, we are required to be flexible in terms of meeting the stated targets. In such exceptional circumstances, it will be the responsibility of the developer to provide substantial and verifiable evidence to demonstrate that the requirements of Policy AFH1 cannot be met. This will need to be tested by means of a rigorous site specific economic viability assessment based on an “open Book” approach and used to determine a revised appropriate level of provision.

Local Plan Objective

To help meet affordable housing needs of the District by securing and delivering a significant proportion of affordable housing from developments with market housing, whilst ensuring the overall viability of the development is not prejudiced and that a mix of tenure is provided that meets the needs of the local area and create balanced communities.

AFH1 Affordable Housing

New housing developments, including affordable housing, will be expected to provide for a mix of dwelling size, type and tenure that meet the identified housing needs of the local area. New housing developments must make the most effective use of the land, taking into account the character of the local area.

Affordable housing is required at a level of 35% of the number of dwellings on development sites with 5(net) dwellings or more.

> Where sites are allocated in a Local Plan that document may specify a different, and potentially higher, housing target having regard to the findings of the associated viability assessment and any site specific considerations.
>
> Affordable housing provision should incorporate a mix of tenures. The presumption is for development sites of 49 dwellings (net) or less that around 80% of the total number of affordable homes provided will be for social rented accommodation with the remainder being for intermediate accommodation. For development sites of 50 dwellings (net) or more around 40% of the total number of affordable homes provided will be for social rented accommodation, 40% will be affordable rent and 20% intermediate accommodation.
>
> Where it can be proven that affordable housing requirements cannot be achieved, due to economic viability, there will be flexibility in meeting stated targets. In such exceptional circumstances, the tenure of affordable housing should be examined prior to the proportion of affordable housing. It will be the responsibility of the applicant to demonstrate that the requirements of the policy cannot be met. The closest alternative target that can be achieved will be sought taking into account viability and need.
>
> The affordable housing will be distributed within the site to ensure it is integrated and indistinguishable within the new development and surrounds. It will also be comparable in design terms with the market housing on site.
>
> Affordable housing should be delivered on site, however in exceptional circumstances a commuted payment may be accepted in lieu of on-site provision. These circumstances may include provision where a Registered Provider finds it uneconomic or impractical to provide units in the scale or form agreed.
>
> …
>
> **3 Superseded Policies**
>
> 3.1 Adopted Core Strategy Local Plan Policy WCS8, and associated text in paragraphs 7.10 to 7.14 is superseded for Wealden District, excluding the part of Wealden District within the South Downs National Park.

The grounds

21. The claimant advances this application on two quite distinct grounds. The first ground is related to the policies of the development plan which have been set out above. It is submitted on behalf of the claimant that on a proper interpretation of the development

plan policies there was a policy requirement for a mix of size and type of market homes which played no part in the officers' report and was completely overlooked in the decision-making process. It is therefore submitted under ground 1 that the decision was unlawful since the defendant failed to discharge its statutory duties under section 70(2) of the 1990 Act and section 38(6) of the Planning and Compulsory Purchase Act 2004, as they failed to have regard to the requirements of policy from the development plan when reaching their conclusions. This ground is contested by the defendant and the first interested party on the basis that in fact there was no development plan policy in relation to the open market housing mix which had to be applied to enable a lawful consideration of the claimant's objections. Alternatively, the defendant and the first interested party contend that the officers' report was not deficient as the question of tenure mix was not a principal controversial issue about which members required advice and, in any event, section 31(2A) of the Senior Courts Act 1981 applies to this judicial review as the outcome would not have been substantially different even had the defendant been wrong in failing to consider relevant development plan policy in relation to the question of the open market housing mix.

22. Ground 2 of the claimant's case is that the members of the committee were provided with misleading advice in relation to whether or not the defendant could insist in principle on the numbers of units being reduced to accommodate environmental constraints during consideration of reserved matters applications. The effect of the grant of the planning permission was to grant outline consent for up to 205 units, and thus at the reserved matter stage an application for 205 units could not be refused simply on the basis that it proposed too much development. It could only be refused if the application was not satisfactory in the sense that it did not provide the most appropriate layout for 205 units; any reserved matters application had to be approached on the basis that it was accepted as a matter of principle that 205 units could be accommodated on the site. The defendant and the first interested party resist this on the basis that the officers' report was clear and nothing that was said by Mr Robins superseded the advice the members were given in the officers' report in which it was made clear that it had been established that the site could accommodate 205 units satisfactorily.

23. It is convenient to consider each of these grounds, and the law and submissions relevant to them, separately, since they raise quite independent and discreet considerations.

Ground 1: the law

24. A local planning authority has a discretion whether or not to grant approval to an application for planning permission which has been made to it, and this discretion is governed firstly by section 70(1) and (2) of the 1990 Act. These provisions require that the local planning authority must have regard to the provisions of the development plan in so far as material to the application, as well as any local finance considerations that are material to the application and any other material considerations. The discretion is also governed by section 38(6) of the 2004 Act which provides as follows:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the

> determination must be made in accordance with the plan unless material considerations indicate otherwise."

25. The central importance of section 38(6) of the 2004 Act to the exercise of determining a planning application was specifically addressed by the Court of Appeal in the case of *R (Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 87; [2015] 1 WLR 2367. The judgment of Richards LJ, with which the other members of the court agreed, analysed the effect of section 38(6) of the 2004 Act in the light of the earlier decision of the House of Lords in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447. His ultimate conclusion was set out in paragraph 33 of the judgment in the following terms:

> "33…It will be clear from what I have said above that in my view compliance with the duty under section 38(6) *does* as a general rule require decision-takers to decide whether a proposed development is or is not in accordance with the development plan, since without reaching a decision on that issue they are not in a position to give the development plan what Lord Clyde described as its statutory priority. To use the language of Lord Reed in *Tesco Stores v Dundee City Council (Asda Stores intervening)* [2012] PTSR 983…they need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations."

26. The question of the correct approach to the interpretation of planning policy is a matter which has been considered in a variety of authorities. Having reviewed many of those authorities in the case of *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] PTSR 81 it appeared to me possible to distil the principles from those cases as follows:

> "23. In my view in the light of the authorities the following principles emerge as to how questions of interpretation of planning policy of the kind which arise in this case are to be resolved:
>
> (i) The question of the interpretation of the planning policy is a question of law for the court, and it is solely a question of the interpretation of the terms of the policy. Questions of the value or weight which is to be attached to that policy for instance in resolving the question of whether or not development is in accordance with the Development Plan for the purposes of section 38(6) of the 2004 Act are matters of judgment for the decision-maker.
>
> (ii) The task of interpretation of the meaning of the planning policy should not be undertaken as if the

planning policy were a statute of contract. The approach has to recognise that planning policies will contain broad statements of policy which may, superficially, conflict and require to be balanced in ultimately reaching a decision: see the *Tesco Stores* case [2012] PTSR 983, para 19 and the *Hopkins Homes* case [2017] PTSR 623, para 25. Planning policies are designed to shape practical decision-taking, and should be interpreted with that practical purpose in mind. It should also be taken into account in that connection that they have to be applied and understood by planning professionals and the public for whose benefit they exist, and that they are primarily addressed to that audience.

(iii) For the purposes of interpreting the meaning of the policy it is necessary for the policy to be read in context: see the *Tesco Stores* case, at paras 18 and 21. The context of the policy will include its subject matter and also the planning objectives which it seeks to achieve and serve. The context will also be comprised by the wider policy framework within which the policy sits and to which it relates. This framework will include, for instance, the overarching strategy within which the policy sits.

(iv) As set out above, policies will very often call for the exercise of judgment in considering how they apply in the particular factual circumstances of the decision being taken: see the *Tesco Stores* case, at paras 19 and 21. It is of vital importance to distinguish between the interpretation of policy (which requires judicial analysis of the meaning of the words comprised in the policy) and the application of the policy which requires an exercise of judgment within the factual context of the decision by the decision-taker: see the *Hopkins Homes* case at para 26."

Ground 1: submissions and conclusions

27. As set out above, it is submitted on behalf of the claimant that development plan policy and, in particular, policy AFH1 of the AHDLP, can only be properly interpreted as applying to the mix of both market and affordable housing and requiring specific consideration of the suitability of a proposed mix of open market dwellings to assess whether or not it complies with the policy. Two potential routes to this interpretation are provided by the claimant in respect of the policy documentation which is set out above. Firstly, whilst it is conceded that Core Strategy policy WCS8 has been superseded as a result of paragraph 3.1 of the AHDLP, paragraphs 7.7 to 7.9

of the Core Strategy remain in force and, it is submitted, have been retained to explain the first paragraph of AFH1. Thus, it is submitted that policy AFH1 of the AHDLP is plainly a policy relating to all tenures of housing in new residential developments, and requiring an open market housing mix within a development which meets the identified housing needs of the local area. Specifically, paragraph 3.1 has not superseded 7.7 – 7.9 of the Core Strategy explanatory text which remains in place in order to provide explanation for the first paragraph of policy AFH1.

28. Alternatively, it is submitted on behalf of the claimant that policy WCS8 is only superseded in so far as it relates to affordable housing, and thus the first part of policy WCS8 which relates to the need for a mix of size, type and tenure in respect of all housing remains policy, alongside the retention of paragraphs 7.7 – 7.9 which provide explanatory text for this element of the policy. The claimant submits that whichever of these routes is taken there is development plan policy which ought to have been applied to the planning application in respect of the mix of open market dwelling sizes and types within the proposal that the defendant was considering. The defendant should have made enquiries as to what was required in relation to the housing needs of the community in terms of mix in order to apply that development plan policy and discharge the duty under section 38(6) of the 2004 Act.

30. In response, on behalf of the defendant and the first interested party, it is submitted, firstly, that the introduction to the AHDLP is perfectly clear that its policies apply only in relation to affordable housing proposals. The site under consideration is outside the South Downs National Park and therefore not within an area for which Core Strategy policy WSC8 is retained. Paragraph 1.1 makes clear that the AHDLP is solely directed to reviewing Core Strategy policy WSC8 on affordable housing. Secondly, the supporting text at paragraphs 2.1 to 2.5 are solely and exclusively concerned with affordable housing and not market housing. Consistent with this is the Local Plan Objective which has been fully set out above.

31. Thus, the defendant and the first interested party submit that policy AFH1 is solely concerned with affordable housing developments, and solely of application to affordable housing proposals or the elements of a proposal that are affordable housing. The claimant's argument seeks to wrench the first paragraph of policy AFH1 entirely out of its context in order to suggest that it applies to forms of tenure to which it plainly was not intended to apply. Reinforcing these submissions, the defendant and the first interested party draw attention to paragraph 3.1 of the AHDLP which expressly identifies, pursuant to Regulation 8(5) of the Town and Country Planning (Local Planning) (England) Regulations 2012, that policy WCS8 of the Core Strategy and the associated text in paragraphs 7.10 to 7.14 are superseded, and therefore of no effect in the defendant's administrative area outside the South Downs National Park.

32. Returning to the Core Strategy, the defendant and the first interested party acknowledge that paragraphs 7.7 to 7.9 are retained within that document but emphasise that paragraph 7.9 makes clear that a Strategic Sites and Delivery and Site Allocations Development Plan Document will be prepared and adopted to "provide detailed policies regarding housing mix and design, densities and standards of design". The clear intention of this explanatory text is, therefore, to provide the framework for the production of this Development Plan Document which has not yet

been undertaken. Those paragraphs therefore are nothing to do with policy AFH1, nor are they able to be said to relate to the first part of policy WCS8 when that policy has been unequivocally superseded. Finally, the defendant and the first interested party note that in the monitoring section of the AHDLP there is no reference whatsoever to market housing: the monitoring is solely directed towards affordable housing. Further there is nothing in the glossary section of the AHDLP pertaining to market housing. On this basis it is submitted that there was no policy related to the housing mix in respect of open market dwellings, as opposed to affordable dwellings, for the defendant to consider.

33. Having reflected upon these submissions I am in no doubt that the defendant and the first interested party are correct in their approach to, and interpretation of, the policies. It is in my judgment critical that the interpretation of these policies is undertaken in a purposeful and practical manner, with an emphasis on seeking the clearest and most obvious analysis of how these elements of the development plan relate to one another and what they were seeking to achieve.

34. Starting with the Core Strategy, the document has been laid out and structured under headings so as to make plain to the reader which parts of the text are relating to which topics or types of development. That structure clearly distinguishes affordable housing and the specific policy provisions in relation to that type of housing development, separating it for good reason from policy considerations relating to housing of all types of tenure including open market housing. It is clear that paragraphs 7.7 to 7.9 of the Core Strategy are under a separate and distinct heading to paragraphs 7.10 to 7.13. Paragraphs 7.7 to 7.9 relate to housing type and size and, when read as a whole and purposefully, make clear that they are describing and justifying the production of a future and separate Development Plan Document addressing detailed policies in relation to housing mix and design related to all tenures, including open market housing, as part of residential developments. By contrast paragraph 7.10 to 7.13 of the documents are under the heading "Affordable Housing", and relate specifically to that topic.

35. In my view it is further of some significance for the purposes of understanding the provisions of the development plan that it is spelled out that the effect of the adoption of the AHDLP was to supersede paragraphs 7.10 to 7.13 and policy WCS8 of the Core Strategy with the new policy contained with the AHDLP. It is again clear and unequivocal that the AHDLP is solely concerned with affordable housing. There is no suggestion anywhere within the introduction or the explanatory text for policy AFH1, let alone in the monitoring objectives of the AHDLP, that this policy plays any part in regulating the provision of market housing. The effect of the claimant's submission is, as the defendant and first interested party contend, to entirely dislocate the first paragraph of policy AFH1 from its context, which is simply a general introductory paragraph in a policy which is only of application to affordable housing proposals. The claimant's interpretation further takes paragraphs 7.7 to 7.9 out of context since, firstly, nowhere is it anywhere suggested that they are in place so as to support an interpretation of policy AFH1, and further it is plain that their context is to justify a future production of a further DPD dealing with questions of housing mix. Lastly, in the light of the clear terms of paragraph 3.1, in so far as the claimant submits that the first part of policy WCS8 of the Core Strategy may be retained to apply to open market housing, this is a submission which runs quite contrary to the clear terms of

the development plan itself. There is no justification for the resurrection or resuscitation of that policy on the basis that the defendant has, as yet, failed to honour the commitment it made for the production of a bespoke policy addressing open market housing mix in the form of the promised Development Plan Document. Moreover, akin to the analysis of policy AFH1, policy WCS8 was, when relevant, of specific application to affordable housing proposals.

36. It follows from the foregoing that in my judgment, having examined the correct interpretation of these elements of the development plan and the way in which they interrelate, it is clear to me that the defendant and the first interested party are correct to submit that there was in fact no development plan policy to be applied in relation to open market housing mix. There was, therefore, no legal error in the approach that was taken in the officers' report. In the light of that conclusion, it is unnecessary for me to consider the submissions made in respect of whether it was necessary for this issue to be addressed by the officers in their report at all, or, alternatively, whether, if there were an error of law, it is highly likely that the outcome would not have been substantially different in any event. The claimant's ground 1 must fail.

Ground 2: the law

37. Although the issue was not contentious between the parties, it is worthwhile recording the claimant's submissions in relation to the proper understanding of the phrase "up to 205 units", as this is the essential backdrop to the claimant's case on ground 2. On behalf of the claimant, it is submitted that the use of the words "up to" a specified number of dwellings or quantum of development does not permit the defendant to require a lower number of dwellings as part of reserved matters in order to deal with the constraints of the site. Up to 205 units were applied for and therefore they must have been permitted, and thereafter reserved matters approached, on the basis that it has been established through the illustrative material accompanying the outline application that 205 units are capable of being satisfactorily accommodated on the site. The claimant submits that this proposition is well established on the authorities.

38. The first authority upon which reliance is placed is the case of *R (on the application of Harvey) v Mendip District Council* [2017] EWCA Civ 1748. This case concerned the grant of outline planning permission for "up to 6 affordable homes and 1 open market dwelling house". The case proceeded before the Court of Appeal on a single ground of appeal, namely the contention that the defendant's Planning Board had wrongly considered that the proposed development was in accordance with a policy in the development plan with respect to rural exception sites, whereas in fact when that policy was properly interpreted the proposed development was in breach, since the terms of the policy only permitted approval of affordable homes under the exceptions policy to the extent that the need for them was evidenced in a housing needs assessment. There was a Local Housing Needs Assessment in the evidence before the Planning Board which identified that in the settlement in question there was a need for five affordable homes. The application was therefore in excess of the identified need by providing for six units of affordable housing. Giving the leading judgment in the Court of Appeal Sales LJ (as he then was) concluded that, on the correct interpretation of the policy, the proposal was contrary to it since an identified need for five rather than six affordable homes had been established.

39. Counsel for the developer sought to argue that since the outline planning permission was granted for up to six affordable homes it would have been possible for the defendant to refuse consent for the building of more than five affordable homes at the reserved matters stage as that was a matter which went to the scale of the development which was therefore a matter requiring reserved matters approval. Whilst not ruling conclusively on this submission on the basis that full argument had not been heard, nonetheless Sales LJ stated that he was "very doubtful" that the submission could possibly be right.

40. Earlier authority, whilst not dealing head on with the question of what interpretation is to be placed upon the words "up to" in outline planning permissions, did address comparable issues providing some assistance with the resolution of this point. The first case to consider is the decision of the Court of Appeal in *Medina Borough Council v Proberun Limited* (1991) 61 P&CR 77 in which the leading judgment of the Court of Appeal was given by Glidewell LJ. The case concerned a residential planning permission which, following an appeal process, was granted by the Secretary of State as a bare outline permission with no indication of any quantum of development being consented.

41. The permission was subject to a condition which required the approval of the details of the means of access to the site. An application for approval of the means of access was made to the local authority to which the highway authority made objection. Their contention was that a satisfactory access could only be achieved through the use of land beyond the control of the applicant and outside the site boundary. The application for approval of this reserved matter was not determined in time, and an appeal against non-determination ensued. The Inspector dealing with the appeal dismissed it. There was then an application to this court heard by Sir Frank Layfield QC which led to the Inspector's decision being quashed and the matter coming before the Court of Appeal. The essence of the argument for the developer, which succeeded in the court below, was that there was nothing in the language of the condition which required the use of land outside the application site for provision of the access, and therefore it was not open to the local authority to refuse planning permission upon the basis that land beyond the control of the applicant was required in order to form a satisfactory access. Reliant upon observations in the speech of Lord Morris of Borth-y-gest in *Kingsway Investment Limited v Kent County Council* [1971] AC 72; 21 P&CR 58 the conclusions reached by Glidewell LJ in dismissing the appeal were expressed in the following terms:

> "In my opinion if a planning authority, perhaps because it regrets that outline planning permission has been granted, refuses to approve detailed proposals for access within the boundaries of the site, and makes it clear that only a scheme for access which involves the developer acquiring rights outside the land currently under its control will be approved, it is, to adopt Lord Morris's wording, misusing its function so as to achieve, without compensation, what would amount to a revocation or modification of a permission already given. Such a misuse of power is patently unlawful.
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> …

> I look back at the wording of the condition itself: "Approval of the details of…the means of access thereto [which means to the building] shall be obtained from the local authority." First, it seems to me that this is a straightforward matter of construing the condition, as indeed Sir Frank Layfield clearly thought. The condition is a normal "outline" condition. It presupposes that the details of the access to be approved will be of an access within the site, the subject of the permission. It is not worded so as to make commencement of the development dependent on the completion of some defined scheme of works, and in my view it cannot be construed as having such a meaning. In my judgment, therefore, the planning authority were obliged by the condition to be willing to approve some form of access junction between Medham Lane and Newport Road which could be created within the boundaries of the application site. It follows that in the circumstances of this case Sir Frank Layfield was justified in adopting the "best means of access" test."

42. In *R v Newbury District Council and Newbury and District Agricultural Society ex parte Chievley Parish Council* [1998] EWCA Civ 1279 the Court of Appeal had to address a number of questions in relation to an outline planning permission which had been granted by the local authority. One of the issues concerned the scope of the power to reserve matters of which details had been provided and specified in the outline application and its approval. Giving the leading judgment of the Court of Appeal, Pill LJ concluded that there was no power to reserve matters of which details had been given in the outline application which had been approved. A subsidiary point arose in relation to whether or not the scale or quantum of development, being in that case the gross floor space of the proposed buildings, which was provided in the outline application at 5,644 square meters, was a reserved matter. Pill J concluded in that connection as follows:

> "Before leaving Issue 2, I should comment upon the judge's finding, supported by Mr Purchas, that the scale or quantum of development, in this case the gross floor space, is a reserved matter. I do not accept that conclusion. Gross floor space cannot in my view be brought within the words "siting" or "design" as submitted by Mr Purchas, especially when those works are read with the words "external appearance", "means of access" and "landscaping of the site". None of these words is appropriate to govern the scale of development in the statutory context. If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance. I do not read Stuart-Smith LJ as having said more

> than that in *Slough Borough Council v Secretary of State* [1995] 17 P&CR 560 when he said that "it is possible when detailed application is considered that the size of the development can properly be reduced having regard to such reserved matters as siting, design and external appearance of the building, access and landscaping". Whilst I agree with the conclusion of Carnwath J on Issues 1 and 2 I consider wrong his conclusion that, as a result, floor space is still to be determined. Floor space could not be treated as a reserved matter."

43. The final case which was cited in relation to these issues was the case of *R (on the application of Saunders) v Tendring DC* [2003] EWHC 2977. This case concerned a challenge to the grant of reserved matters for 77 dwellings pursuant to a bare outline planning permission which did not specify the number of dwellings being approved (as well as a challenge to a full planning application for car parking and infrastructure on an adjacent site) where the planning history included an earlier refusal for full planning permission on the site for 77 dwellings which had been unsuccessfully appealed. It was contended that, in particular in relation to the subsequent approval of reserved matters for 77 dwellings, the local planning authority's earlier grounds based upon safety and environmental capacity for refusing the full application for 77 dwellings were relevant and should have been before the members of the Planning Committee but they were not.

44. The developer who had the benefit of this reserved matters approval for 77 dwellings, which was measured against an outline planning permission which did not specify any quantum of dwellings, placed reliance upon the *Newbury* case, and contended that it was not possible for the local planning authority to refuse to approve details of 77 dwellings rather than, for example, 50 dwellings on the site. This was because it was contended that when the local planning authority fought the appeal against the full application for 77 dwellings, they were contesting the suitability of the site for development as a matter of principle, whereas in the context of the approval of reserved matters the principle of development was settled and accepted. Sullivan J (as he then was) was not persuaded that as a question of fact this was the stance of the local planning authority in the appeal: properly understood their appeal statement was contesting the quantum of development not development in principle. The conclusion reached in relation to the main issue was expressed by Sullivan J at paragraph 57 of the judgment as follows:

> "57. There is an important distinction between the *Newbury* case and the present case. In the *Newbury* case the outline planning permission specified the permitted gross floor space. In those circumstances it is not surprising that the Court of Appeal concluded that the permitted floor space could not be cut down by means of a condition reserving design details for subsequent approval. The details to be approved would have to be details of a building of the permitted size. The present case would be analogous with *Newbury* if the 1993, 1998 and 2002 outline permissions had specified the number of dwellings

> permitted on the site. They did not. No upper or lower limit was specified. In those circumstances, it was open to the local planning authority to control the number of dwellings to be erected on the site by controlling not merely their design, but also their siting, and indeed the amount of landscaping to be provided on the site. The public report effectively acknowledges that it is open to a local planning authority to control the number of dwellings to be erected on a site that has the benefit of a bare outline permission by referring under housing policy and planning history to the advice relating to density in PPG3. The report makes the point that PPG3 seeks densities of between 30-50 dwellings per hectare, and that the density of the proposed development was 40 dwellings per hectare. Those observations would have been entirely irrelevant if there was no power, at the reserved matters stage, for a local planning authority to seek to increase or reduce the number of dwellings proposed on a site with the benefit of a bare outline permission."

45. It will be apparent that none of these authorities directly address the question of the proper approach to a planning permission granted in outline for "up to" a given number of dwellings. However, taking the contrasting situations presented by the case of *Newbury* and that of the case of *Saunders,* the powers of the local planning authority in relation to reserved matters applications pursuant to an outline permission appear to be governed by the proper interpretation of the outline planning permission and, in particular, whether it specifies a given quantum of development which is subsequently to be articulated through the reserved matters application.

46. It needs to be borne in mind that, of course, reserved matters pursuant to an outline planning application are defined within article 2 of the Town and Country Planning (Development Management Procedure) (England) Order 2015, as part and parcel of the provisions under articles 5 and 6 of the 2015 Order which regulate applications for outline planning permission and applications for approval of reserved matters. The principle which obviously flows from these legal provisions is that a reserved matters application must be within the scope of the outline planning permission which was granted, and must provide for reserved matters details consistent with the grant of outline planning permission. These provisions help explain the case of *Proberun* and support the proposition that the outline permission sets the perimeters or framework for the consent which is being granted and following which reserved matters are then submitted.

47. The logic of this position is that in granting outline permission for "up to" a given number of dwellings it has been accepted by the local planning authority that the number of dwellings specified in this formula is an acceptable quantum of development. As a matter of interpretation of such an outline planning permission firstly, any application for the specified number of dwellings would be within the scope of the outline but, secondly, it is open to the applicant for reserved matters to provide details for a smaller number of dwellings. What is not available to the local planning authority is to refuse an application for the specified number of dwellings on

the basis that the site is not capable of accommodating that number in principle. By the same token it is open to the local planning authority to refuse a reserved matters application for the specified number of dwellings on the basis that it does not amount to the best means of achieving the delivery of the specified number of dwellings on the site of the outline planning permission.

48. This is the backdrop to the claimant's principal submission under ground 2, which is that the members were misled by the observations of Mr Robins before the end of the debate, which are set out above. The claimant contends that these remarks, in the context of remarks also made by the chair of the committee, misled the committee by suggesting to them that it was open to them to refuse a reserve matters application even were it to be submitted for 205 dwellings, and on the basis that although the outline permission had been granted for "up to 205" they could require a lesser number in the reserved matters approval to accord with the environmental constraints of the site.

49. The jurisprudence in relation to the correct approach to considering whether or not members have been misled into the grant of planning permission by an officers' report is well established and was definitively distilled in paragraph 42 of the judgment of Lindblom LJ in the case of *R(Mansell) v Tonbridge & Malling BC* [2017] EWCA Civ 1314; [2019] PTSR 1452. In *Juden v London Borough of Tower Hamlets and others* [2021] EWHC 1368 it was accepted by Sir Duncan Ouseley sitting as a High Court Judge that the principles in relation to misleading advice could also apply to advice provided by an officer during the course of discussions at a committee meeting considering an application for planning permission: in that case misleading advice recorded in the officers' report was not properly clarified in the oral presentation to members so as to obviate the error in the report. These principles fall to be applied in the present case.

50. This case also raises the question of the correct approach to be taken by the court when presented with a transcript of a discussion or debate leading to a resolution by a local authority committee. The manner in which this type of material should be evaluated is addressed in the authorities referred to by Singh J (as he then was) in the case of *R (on the application of The Mid- Counties Co-operative Ltd) v Forest of Dean District Council* [2017] EWHC 2056 at paragraph 58 as follows:

> "58. The third principle to bear in mind is that a decision such as that under challenge in the present case is take by a collective body, in this case the full Council. In *R v London County Council, ex p London and Provisional Electric Theatres Limited* [1915] 2 KB 446, at 490-491, Pickford LJ said:
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> "With regard to the speeches of the members which have been referred to, I should imagine that probably hardly any decision of a body like the London County Council…could stand if every statement which a member made in debate were to be taken as a ground of the decision. I should think that there are probably few debates in which someone does not suggest as a ground for a decision something which is not a proper ground; and to say that, because somebody in debate has put

forward an improper ground, the decision ought to be set aside as being found on that particular ground is wrong."

59. As Schiemann J (as he then was) said in *Poole Borough Council, ex p Beebee* [1991] 2 PLR 27, at 31:

"…I have grave reservations about the usefulness of this sort of exercise when there is no allegation of bad faith. These reservations in part arise out of the theoretical difficulties of establishing the reasoning process of a corporate body which acts by resolution. All one knows is that at the second that the resolution was passed the majority were prepared to vote for it. Even in the case of an individual who expressly gave his reasons in council half an hour before, he may well have changed them because of what was said subsequently in debate."

…

61. Finally, in this context, it is important to recall that, insofar as it is helpful to refer to the debate of a collective decision-making body such as this, it is "the general tenor of their discussion rather than the individual views expressed by committee members, let alone the precise terminology used" which will be relevant: see *R v Exeter City Council, ex p Thomas* [1991] 1 QB 471, at 483-484 (Simon Brown J, as he then was); see also *R(Tesco Stores Ltd) v Forest of Dean District Council* [2014] EWHC 3348 (Admin), para 23 (Patterson J)."

Submissions and conclusions

51. On behalf of the claimant it is submitted that, as set out above, any advice to the effect that it would be possible to refuse a development for 205 dwellings in principle as it could not be possible to acceptably accommodate 205 dwellings on the site would have been seriously misleading, in that it would have led the members into error as to their powers at the reserved matters stage. The claimant submits that it is clear that the environmental capacity of the site was a contentious issue, and this is evident from the responses made by Historic England and the defendant's Conservation Officer. The contribution from the Landscape and Arboricultural officer also illustrated the environmental constraints of the site and the difficulty of accommodating the scale of development proposed. The point is illustrated by the problems which were identified by the Landscape and Arboricultural officer with respect to the illustrative layout

proposals accompanying the application. Thus, the discussion which occurred in committee, and which is recorded above, provided a clear emphasis on the inevitability of a number of dwellings lower than 205 having to be approved as part of the reserved matters.

52. These matters were not corrected by Mr Robins. Indeed, the claimant relies upon Mr Robins' observation that a marker was being laid down and "if we don't like reserved matters, assuming outline is granted, then we can withhold the reserved matters, if we are unhappy with how that manifests on the ground", an observation made in the context of the discussion as to the impacts on the capacity of the site arising from the various environmental constraints. The point was further reinforced and exacerbated by Mr Robins expressing the view that he thought it may be unlikely that the final figure for the number of dwellings approved would be below 205.

53. By contrast the defendant and the first interested party submit that, in accordance with the authorities, when considering the debate, it is important not to fixate upon the observations of a single contributor to the discussion but to look at the general tenor of the debate and bear in mind that it is a collective decision which is being considered. Furthermore, the defendant and the first interested party emphasise that the officers' report was clear and unequivocal that 205 dwellings were being applied for, and that a reduction in that number was not called for on the basis that 205 dwellings could be accommodated on the site without unacceptable impacts. The observations of Mr Robins were focusing on the specific contributions made by members; what was said by him about the possibility of fewer units was simply speculation about a possible outcome. Nothing that was said by Mr Robins went behind the clear and unequivocal statements contained in the committee report.

54. Having considered these submissions in the light of the relevant authorities I am satisfied that the defendant and the first interested party are correct. When assessing whether or not the members of the committee were significantly misled so as to infect the decision which they made with legal error it is important in my judgment to commence with the written advice which they received in the form of the officers' report before them. There could be no dispute but that the report supported the proposition that there was capacity both in environmental and infrastructural terms to accommodate 205 dwellings. The objections raised on heritage grounds were considered but were not ultimately regarded as persuasive. It was concluded that the observations of the Landscape and Arboricultural officer, and the requirements in relation to buffer zones for instance adjacent to ancient woodland, were matters which could be properly accommodated. The recommendation which was placed before members for approval was clearly predicated on the ability of the site to accommodate 205 dwellings.

55. In my view it is, as set out in the authorities referred to above, necessary to approach the transcripts of the committee discussions with realism as to their nature, being different in kind from the carefully formulated contents of an officers' report, and bearing in mind the context in which they occur, namely a discussion or debate seeking to forge a collective decision. As the authorities suggest, there is a danger of focussing too closely on the contributions of one participant in the process. Similarly, in my view, there is a danger in forensically examining the ex-tempore remarks of a person responding to the discussion, as Mr Robins was, doing his best to engage

constructively with members' concerns, but not attempting to provide a comprehensive and precise supplementary report in oral form.

56. The key point from my perspective is that there is nothing in the observations of Mr Robins to suggest that the officers' views as articulated in the report which he is presenting and commending to the members have in any way changed or been superseded. That, ultimately, is the material which was before the members to inform their decision. It is true that the chair of the committee made the observation that the 205 dwellings was unlikely to be achieved, and that Mr Robins had observed that when all of the constraints were taken into account, he thought that the proposal could probably be fewer than 205 units. However, these observations were, against the backdrop of the clear material contained within the committee report, speculative and not definitive as what might be the outcome of the reserved matters process, nor seeking to gainsay that the site was capable of accommodating the specified number of houses. What Mr Robins did not say was that the site did not have the capacity for 205 dwellings: he was indicating that it would be for the reserved matters application process to engage with the detailed resolution of the issues that the members had identified, and the outcome may be less than 205 dwellings, but not that it had to be. This case is, therefore, a long way from the factual situation in the case of *Juden*. In so far as the chair of the committee may be thought to have suggested that applications for less than 205 dwellings could be refused in principle, this was simply one contribution to the discussion and Mr Robins did not endorse it, nor was it reflected anywhere in the clear advice in the officer's report.

57. Taking the officers' report as the starting point, and examining the general tenor of the understandably discursive debate which occurred at committee, I am quite unpersuaded that the members were in any way misled, or could have been under any illusion that they could in principle refuse an application for reserved matters for 205 dwellings made pursuant to the outline permission they were being asked to grant, or that they were being asked to approve an outline planning application for up to 205 dwellings when the site was simply not capable of acceptably accommodating that quantum of development. It follows that ground 2 must be dismissed.

Conclusion

58. In the light of the matters set out above and for the reasons given I am not satisfied that there is any substance in either of the claimant's grounds in this case and, therefore, this application for judicial review must be dismissed.