RE: LAND SOUTH OF ACCRINGTON ROAD, WHALLEY

OPINION

Introduction

1. We are asked to advise Oakmere Homes ("Oakmere") in connection with their application for planning permission for the:
   "*erection of 17 dwellings and 57 apartments with associated access, roads, car parking, landscaping and infrastructure, including a public car park to serve Whalley town centre*" ("the Application/ the Development") on land south of Accrington Road, Whalley ("the Site").

2. The Development was recommended for approval by officers of Ribble Valley Borough Council ("the Council") and was considered by the Council's planning committee on 28th November 2024. Contrary to officer recommendation members resolved:
   "*RESOLVED THAT COMMITTEE:*
   Minded to REFUSE planning permission on the grounds of:-
   - failure to provide any affordable housing in conflict with Key Statement H3 and Policy DMH1 of the Ribble Valley Core Strategy
   - Insufficient information submitted in respect of failure to undertake an assessment of nearby junctions to demonstrate that the development would have an acceptable impact on highway and pedestrian safety, in conflict with Key Statement DMI2 and Policy DMG3 of the Ribble Valley Core Strategy. This needs to reflect the increase in vehicle movements, parking on Accrington Road and number of accidents reported that have occurred since the previous planning permission on the site.
   To be brought back to a future committee with draft refusal reason(s) based on the above." ("the Resolution")

3. We are asked to advise on the robustness of the Council's approach.

Discussion

The New NPPF

4. It is well established that a local planning authority ('LPA') is seized of a planning

application up to the point that a decision notice is issued, and that it is only when the decision notice has been issued that the application is 'decided' (see *Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P. & C.R. 223; affirmed (1981) 42 P. & C.R. 1.)

5. The logical corollary of that principle is that once a delegated committee of a local planning authority ('LPA') has resolved to grant permission (usually subject to some trigger such as the applicant entering into a satisfactory s.106 obligation), then the matter may still be lawfully remitted back to the committee by the officer to whom the decision has been delegated, in order to reconsider that decision.

6. There is now a well-established line of jurisprudence which addresses the circumstances in which such an officer ought to remit the matter back to committee. In the seminal case of *R. (On the Application of Kides) v South Cambridgeshire DC* [2003] 1 P. & C.R. 19:

"*126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of s.70(2) , it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision*."

7. Some of the generalised comments in *Kides*[1] have been wrongly taken to suggest that there is an obligation to take a matter back to committee if a material consideration had arisen which could have made a difference to the original decision. That would be an

[1] *"In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a 'material consideration' for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision." Per Parker LJ at para 126*

odd conclusion given the factual matrix of *Kides* which involved not quashing permission despite significant policy changes and a gap of five years between resolution and grant. Happily, in subsequent cases the Court has advised that the decision to remit the matter back to committee was a matter of broad discretion for the officer which should be exercised pragmatically and that the comments by Parker LJ were not to be taken as mandatory rules of law. Thus in *R (on the application of Dry) v West Oxfordshire* [2010] EWCA Civ 1143, which involved a three year gap between resolution and grant of permission the Court of Appeal declined to quash the permission despite the fact that in the interim the flood risk categorisation of the site had changed from being mostly within zone 1 to mostly within zone 2 (ie low to medium risk). Lord Justice Carnwath held that the officer acted lawfully in issuing the decision and observed:

> *"16. Without seeking to detract from the authority of the guidance in Kides , I would emphasise that it is only guidance as to what is advisable, "erring on the side of caution". Furthermore, in that case there had been a gap of five years between the resolution and the issue of the permission. The guidance must be applied with common sense, and with regard to the facts of the particular case."*

8. That case was followed by a number of others where the Court took a similar pragmatic approach, notably *R (obo Hinds) v Blackpool BC* [2012] EWCA Civ 466, *R. (Chilton Parish Council) v Babergh DC* [2019] EWHC 280 (Admin) and most recently *R (on the application of Hayle) v Cornwall* [2023] EWHC 389 (Admin). In the latter, Lane J. refused to quash a decision which was issued without remitting the matter back to members when the funding for a significant element of road infrastructure was withdrawn between resolution and grant. Applying the distillation of the principles in *R. (on the application of Hardcastle) v Buckinghamshire Council* [2022] EWHC 2905 (Admin) Lane J concluded that a LPA's duty to have regard to material considerations did not require that every new material consideration arising after a resolution in principle to grant planning permission, but before the issue of the decision notice, had to result in a referral back to the committee. To the contrary, the duty was discharged if the local authority had considered all material considerations affecting the application at the date on which the decision notice was issued. And the duty to remit only arose where a consideration which was 'so obviously material' had arisen that it was capable

of giving rise to the real prospect of a different conclusion being arrived at.

9. The introduction of the new NPPF, and in particular the impact of a change to the standard methodology on the Council's housing land supply, in our opinion amounts to an obvious new material change in circumstance.

10. It is difficult to see how the introduction of a significant new approach to housing policy would not warrant the remission of the case back to members. In our view it is now incumbent on the Council to reconsider the Application against the new NPPF. If officers failed to do so this would arguably be an error of law. Perhaps more importantly, remitting the application back to members would, in any event, be an obvious and practical course of action for the Council since any appeal would fall to be considered against the new NPPF and so the Council would inevitably be bound to consider its impacts.

11. The most obvious issue that requires reconsideration by the Council is the impact of the new standard methodology on the Council's housing land supply. §78 of the new NPPF requires the Council to update annually a supply of specific deliverable housing sufficient to prove 5 years worth of housing. The housing requirement figure in the Council's development plan is more than 5 years old and so their housing land supply falls to be assessed against the standard methodology in accordance with §78 and footnote 39 of the new NPPF.

12. Under the new standard methodology published under the new NPPF the Council's standard methodology housing requirement is 310 dwellings per annum. That is the figure against which the Council's housing land supply must now be judged. The Council's last published housing land supply statement relied on March 2022 base data. That position is now significantly out of date and the failure to maintain an annual assessment of housing land supply is in breach of national policy (the requirement to maintain an annual assessment of housing land supply is not a new one and has been present in national policy for years).

13. The Council should now consider the Application against the new NPPF and part of this requires them to make an assessment of whether the tilted balance contained in

§11 is engaged as a result of their housing land supply position. If the Council refuse planning permission and that decision is appealed then it is inevitable that their housing land supply will be scrutinised at appeal and if an Inspector determines that the Council do not have the requisite supply then until that position is remedied all housing applications which they determine will fall to be determined against the tilted balance. The Council could avoid such a negative finding if they were to grant planning permission for the Application, which as per the Officer's recommendation is acceptable regardless of the tilted balance being engaged. If they were to do so, not only would it result in them not having a negative finding made about their housing land supply but it would improve their housing land supply position as the Development could be included within it.

14. More importantly, if our analysis (below) is correct that the resolved reason for refusal is evidentially unsupportable – then remitting the matter back to members to reconsider that position would seem sensible and expedient to avoid the costs of any appeal.

Affordable Housing

15. The first issue raised in the Resolution is a breach of affordable housing policies. In recommending approval of the Development Council Officers' recognised: "*The National Planning Policy Framework places an emphasis on viability being a material consideration in the determination of development proposals, whereby benefits must be weighed against any conflicts with the adopted development plan, particularly in relation to the failure to provide adequate on-site provision or off-site contributions to assist in the delivery of affordable housing provision off-site."* They were correct to do so. The NPPF's recognition that viability should be taken into account when determining applications is now contained at §59. It is further reinforced by the NPPG at Paragraph: 007 Reference ID: 10-007-20190509 and Paragraph: 008 Reference ID: 10-008-20190509. Both the national policy and guidance recognises that viability can be considered when determining contributions for affordable housing. In a situation such as this where there is agreement between the Applicant and the Council's professional advisors that the Development cannot deliver a policy compliant level of affordable housing it is incumbent on them to have regard to this as a material consideration.

16. It must be recognised that the development plan does not contain any policies that allow for the submission of viability evidence when considering affordable housing. The policies are drafted in an oddly binary manner, either a policy compliant level of affordable housing is provided or it is not. This is inconsistent with national policy as we have outlined above and therefore reduces the weight that can be attached to any policy breach.

17. Further, when considering the Application there is no evidence that the members went on to consider the other benefits that were being delivered by the Application. Part of the Application is to deliver a community car park, for which there is no policy requirement, but is something that has been a long term desire of local residents. The Application could deliver a higher level of affordable housing if the community car park were not to be delivered. If the technical non-compliance with affordable housing policies was so objectionable to local members the appropriate course of action was not to resolve to refuse the application but to engage with the Applicant through Officers to tweak the scheme so that greater compliance was achieved at the expense of other benefits of the Application.

18. Officers were in our view entirely correct to conclude that merely a technical breach of the development plan policies would not justify a reason for refusal. Given the agreement between the viability experts it is difficult to see how the Council could credibly defend this reason for refusal at an appeal.

Highways

19. The highways issue raised in the Resolution relates to insufficiency of information. No issue was raised prior to the Committee meeting by the relevant statutory consultee or planning officers that there was any insufficiency of information. It was therefore inappropriate and contrary to all relevant guidance for the Committee to resolve to refuse on this basis without giving the Applicant any opportunity to comment on the matter.

20. The Applicant's highways consultants have now produced an updated report to address members concerns. This clearly sets out the minimal level of vehicle

movements that would be generated by the Development; confirms that junction modelling is not required for this level of vehicle movements; and concludes that the impact of the Development would not be material on local highways.

21. The minutes of the Committee meeting suggest that members adopted an unlawful approach when disregarding the relevance of the extant consent on highways impacts. When considering a fallback permission three factors have to be considered as per *R. v Secretary of State for the Environment Ex p. Ahern* [1998] Env. L.R. 189; [1998] J.P.L. 351: whether there is a lawful fallback; whether there is a real prospect of the fallback taking place; and, if so, a comparison between the fallback and the proposed development should be undertaken. The weight to be afforded to that consideration then depends upon the likelihood of it occurring.

22. From reading the officer report it does not appear as if there is any dispute that the previous planning permission remains extant and capable of implementation. The Applicant has indicated that there is at least a "real prospect" of development of the fallback permission taking place. What is then required is a comparison between the fallback and the proposed development. The updated highways work that has now been submitted to the Council compares the impact of the fallback scheme and the Development and confirms there is no material difference at worst but that it is likely that the Application would have less impact than the fallback scheme. Further, the updated highway work indicates that the fallback scheme will have been taken into account in TA's that have been carried out for other nearby schemes and so its impact has already been built into subsequent relevant planning decisions.

23. As the Council is now in possession of this evidence they must consider it before determining the Application. At an appeal the Inspector's decision would be based on the most up to date information and so it would be quite literally pointless of the Council at this stage to ignore the evidence now in their possession. If the Council consider they need more time to consider this information and/or consult with the highways department that would be appropriate and a sounder course of action than refusing planning permission. A failure to have regard to this information at this stage could give rise to a costs claim at the appeal stage for unreasonable behaviour.

24. On the information now available, Members concerns are demonstrably unfounded and the purported highways reason for refusal in the Resolution should not be maintained.

Other matters

25. As highlighted above, it is inappropriate for members to seek to refuse planning permission on the grounds of insufficiency of information when no previous concerns have been raised in that regard. We note that there are no other evidential areas which are suggested to be deficient but should members consider there are when redetermining the Application the appropriate course of action is to invite the production of such evidence rather than refusing planning permission. There is no negative consequence of doing so whereas an appeal will result in significant Officer time and cost being wasted on addressing an issue that could have been dealt with in a constructive matter at this stage.

Conclusions

26. In our opinion and based upon the information before us, Officers were entirely correct to recommend that permission be granted for the Development. Since the Resolution the introduction of the new NPPF and the production of additional highways material has strengthened the soundness of that recommendation. The Council has not yet refused planning permission and in accordance with the principle in *Kides* it is now incumbent on them to consider matters further. Putting aside any maters of law, from a purely practical perspective the most sensible course of action for the Council would be to remit the matter back to committee, so as to enable members to reconsider the matter on the basis of the updated evidence and policy position before them as it is against that background that any appeal would be determined.

27. We advise accordingly. Should anything else arise then please do not hesitate to contact us further.

20th December 2024

Kings Chambers

Manchester – Leeds – Birmingham – London