Bellway Homes (Yorkshire) Limited

(Bellway)

Section 78 Appeal

Full Application for 250 residential dwellings (Planning Use Class C3) including; means of access, car parking, open space, hard and soft landscaping and other associated infrastructure (the Development)

Land at Lee Lane, Royston, Barnsley (the Site).

Plans Submission

Introduction

1 We have been instructed by Bellway in this matter.

2 Despite a formal written request for clarification of any concerns the Council had, in particular in relation to matters of design and highways, regarding the application that is the subject of this Appeal, prior to the appeal being lodged and a written reply having been received from the Council, the Council has now, through its Appeal Questionnaire, raised a range of additional concerns in relation to design, layout and access to, and within the site.

3 As a consequence the Appellant is seeking to address the matters now raised by the Council in the January 2020 material, by way of minor revisions to the layout. The Appellant was not given the opportunity to address these matters sooner, as will be explained below. For the avoidance of doubt, the revisions do not alter the red line, number of dwellings or the point of access.

4 This note examines the scope of the Inspector's discretion to accept revised plans for the proposed Development. In particular, it looks at the legal context of the guidance contained within paragraph 3.1.1, page 9, and Annex M of the Planning Inspectorate's Procedural Guide for Planning Appeals in England, dated January 2020 (the Procedural Guide).

5 The relevant factual background is set out below.

RELEVANT BACKGROUND

6 The application that led to this appeal was submitted in February 2019. As is apparent from the Appeals Questionnaire, very limited consultation response or feedback was given on the application during the entirety of 2019. In particular the Council offered very limited comments in relation to design or highways layout matters until after the appeal had been lodged. The first design response is dated 8 January 2020 (sent to the Appellants on 10 January 2020 with the Appeal Questionnaire) and the first set of additional design comments were set out in a Committee Report that was published by the Council on its web site on 13 January 2020. The Appeal Questionnaire also contained a highways consultation response dated 7 January 2020 and the Appellant was also, on 13 January 2020 able to see the Committee Report and comments in relation to the site access and internal layout. Prior to this the only material available from the Council, despite regularly checking the website and asking the Council for updates, in terms of consultation responses was;

a. Air Quality no objection- 26 March 2019

b. General non-specific comments on ecology- 29 March 2019 (stating the author would not provide substantial comments at that time)

c. Comments from the Police -no objections - 13 March 2019

d. Comments from Environmental Health noting no major concerns- 12 March 2019

e. Comments from the Definitive Maps Officer with no particular concern -18 March 2019

f. A note about and expectation of broadband connections - 25 March 2019

g. A note describing the Travel Plan as a "wonderful document" - 27 March 2019

h. A general note regarding waste management- 12 March 2019

i. Three letters of objection from local people

j. A note requiring an archaeological condition -12 December 2019

7 It was because of this lack of response in relation to design and layout matters that Bellway, having determined there was a need to appeal, wrote to the Council to advise of the intention to appeal and sought comments from the Council about design and layout matters in a letter dated 29 October 2019 (CD 1.16 a). Bellway's letter explains that there were two areas of known concern of the Council; the lack of progress on a Masterplan Framework for the MU5 allocation and the Council's desire to build a new link road to the south or Royston (seeking for the MU5 allocation to pay for or contribute towards it). The letter went on to ask the Council to particularise what other issues the Council had concerns about that would individually or collectively amount to a basis for refusal of planning permission. Specifically it sought to seek comments in relation to design and highways matters (as well as other matters).

8 The Council's response is at CD 1.16 b. In relation to highways it referred to concerns about two off site junctions. It was silent as to the site access or the internal road arrangements. In relation to design, the letter pointed out the need for a correction to the legend of the layout plan and drew attention to the desire to avoid continuous strips of front of dwelling parking of more than 4 spaces. It also asked, in very general terms for consideration to be given to10 characteristics of good design in the National Design Guide, before stating that otherwise the layout appeared to meet external spacing requirements in the main. For context, the letter also affirmed the discussion the Council had initiated with Bellway, with regard to the appeal site contributing towards the cost of a link road. It is worth at this point pointing out that such a road is not in the Local Plan or any SPD, but is a matter the Council has referred to several times, including saying that this is a topic it would expect be covered in any future Masterplan Framework (see for example the Council's email of 10 December 2019 to PINs regarding appeal procedure – stating that the issues in this appeal were simple and only related to the question of the absence of a Masterplan Framework).

9 On receipt of the correspondence at CD1.16b, Bellway amended the layout to address the only particularised concern regarding layout, design or indeed on site highways related matters and submitted this on 22 November 2019 (CD 1.16c), before lodging their appeal. A further discussion took place with the Council on 26 November 2019 and this resulted in further amended house types and layout being submitted on 27 November 2019. The appeal was lodged on 6 December 2019.

10 In summary, despite asking the Council to explain any concerns, other than the lack of a Master Plan Framework and the lack of a contribution to a link road of no policy status, the Council did not offer any concerns in relation to design, layout and internal highways (or the access junction into the site) at any point prior to submitting the Appeals Questionnaire. It was only at this point that consultation responses from early January 2020 indicated any concern on the matters and as now set out in the Council's Committee Report that was produced on 13 January 2020, for the 21 January 2020 Committee. The Appellant has thereafter moved swiftly to produce a layout revision to address the principal issues now raised by the Council, to reduce Inquiry time. This is without prejudice to the Appellant's view as to the need to do so.

Relevant Case Law

11 The relevant authorities dealing with the ability of decision makers to accept scheme amendments during the appeal process, or grant permission for lesser development by imposing conditions, establishes the guiding principles that are to be applied.

Wheatcroft

12 Wheatcroft[1] is generally considered to be the leading authority, when dealing with proposed changes to applications for outline planning permissions. The case concerned an application for outline planning permission for approximately 420 dwellings on a 35 hectare site. Permission was refused by the LPA, and an appeal was made to the Secretary of State. During the course of the planning appeal, the developers proposed a smaller scheme of 250 dwellings on 25 hectares. However, the Secretary of State determined that it would be unlawful to consider the smaller scheme, on the grounds that it was not 'severable' from the original application. Forbes J. held that the correct test to be applied when considering the power of the Secretary of State to accept a reduced scheme, was not that of severability but that of "**substantial difference**" (our emphasis).

13 The key finding of the Court is summarised in the following passage (emphasis added):

[1] Bernard Wheatcroft Ltd v Secretary of State for the Environment and Another (1982) 43 P&CR 233

"…a condition the effect of which is to allow the development but which amounts to a reduction on that proposed in the application can legit-mately [sic] be imposed so long as it does **not alter the substance of the development for which permission was applied for**. If it does alter the substance…it cannot legitimately be imposed, because there has been no opportunity for consultation and so on about what would a substantially different proposal. Parliament cannot have intended conditional planning permission to be used to circumvent the provisions for consultation and public participation contained in this Part of the Act.[2]"

14 Forbes J. went on to highlight that (emphasis added), "Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State **will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised**. The main, but not the only, criterion on which that judgment should be exercised is **whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation,** and I use these words to cover all the matters of this kind with which Part III of the Act of 1971[3] deals"[4].

15 The Court also had reference to the powers of the Secretary of State to determine an appeal, as per what was then section 36(3) of the Town and Country Planning Act 1971[5], which in particular states that the Secretary of State, "…may deal with the application as if it had been made to him in the first instance". No express reliance was placed on this provision in the judgment of Forbes J. however, he referred to it directly when considering the extent of the power to deal with planning appeals.

Inverclyde

16 The House of Lords in Inverclyde[6] addressed the issue of changes to an application for approval of reserved matters during the course of an appeal to the Secretary of State. The case concerned an application for approval of reserved matters related to an outline planning permission which had been granted for residential development on a site of around 33 hectares. The LPA failed to determine the application within the prescribed time limits, and an appeal was lodged on the basis that the LPA were deemed to have refused it.

[2] Ibid; page 239
[3] Now Part III of the 1990 Act.
[4] Wheatcroft; page 241
[5] Now section 79(1) of the 1990 Act
[6] Inverclyde District Council v Secretary of State for Scotland 1982 SC(HL) 64

17 At the outline stage, an area of the site was reserved for educational and other non-residential uses. The application for approval of reserved matters proposed development extending over the area reserved for non-residential uses, but at the planning appeal stage the Appellants offered to restrict the development to exclude that area.

18 In an interim decision, the Secretary of State confirmed his view that he was in principle able to consider the application on the restricted basis (78 houses) but that as insufficient evidence was provided for him to consider that scheme, he invited the written submissions of additional plans and further details, making clear that he would allow comments on the same to be made by LPA, following which he would issue a final decision.

19 The LPA argued that it was not within the powers of the Secretary of State, "to call for the submission of further detailed plans and information, which would have the effect of amending the original application, notwithstanding the expiration of the time limit of three years imposed by condition (2) of the outline permission for the application for approval of reserved matters". Lord Kinkel, delivering the unanimous decision of the House of Lords, held (emphasis added):

"This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The **planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon**. There is, however, one obvious limitation upon this freedom to amend, namely that after the expiry of the period limited for application for approval of reserved matters…**an amendment which would have the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent**."

Wessex RHA[7]

20 This case concerned a challenge to the decision of an Inspector, where he refused to accept an amendment to an appeal scheme for outline planning permission. The change sought was a reduction from 48 houses to 37 houses.

[7] Wessex Regional Health Authority v Salisbury District Council and Secretary of State for the Environment [1984] JPL 344

21 Delivering the judgment of the Court, Glidewell J held that the Inspector had applied the correct legal test of whether or not the alteration **would result in a substantial change**. In those circumstance, the Court could **only interfere if the Inspector's decision could be shown to have failed the test of *Wednesbury* unreasonableness, or was otherwise perverse**. On the facts, the Court determined that this was not the case.

22 The decision affirms the importance of ensuring that the statutory safeguards which provide for public consultation on a proposed development should be given careful consideration. However, the case itself establishes no principle as such, and (as Glidewell J expressly acknowledged) turned on its facts.

Breckland[8]

23 This case also considered a proposed alteration of an application for outline planning permission at the appeal stage. The Inspector, hearing the appeal, considered that he was able to accept an amended red line plan, which **increased** the area of a proposed caravan site from 0.47 ha to 0.6 ha. Having accepted the amendment, the Inspector allowed the appeal. His decision was challenged by the LPA.

24 The Court held that the decision of the Inspector was, on the facts of the case, perverse and therefore unlawful. It should be noted that the appeal was determined by written representations, and the amended site plan was only submitted following the Inspector's site visit. The amended plan was provided by the Inspectorate to the LPA, but not to other third parties with an interest in the appeal.

25 The salient points of the judgment delivered by Mr David Widdicombe QC are as follows:

25.1 An amendment which comprises the enlargement of an application site is not to be considered automatically invalid in itself but, "…needs to be considered with special care and that its legal validity may be harder to justify than a reduction".[9]

25.2 Any amendment to a planning application is an exercise of discretion, which the Court may only interfere with if a decision fails to comply with the *Wednesbury* rules[10].

[8] Breckland District Council v Secretary of State for the Environment and Hill (1992) 65 P&CR
[9] Ibid, page 39
[10] Ibid, page 41.

25.3 Given that the amendment should have been considered to be substantial, he stated "it is not in my view strictly necessary to consider whether there has been a failure to consult persons affected"[11], however he went onto deal with this point in any event (see below).

25.4 The notification of the altered plan to the LPA was not disputed, indeed, the judgment records that the LPA made representations in response. However, the Court relied upon the provisions of the Town and Country Planning (Appeals) (Written Representations Procedure) Regulations 1987, which provided for notice of the appeal to be given to all those who made representations to the LPA. Regard was had to the fact that the notice must describe the application, to enable those consulted to make representations as part of the appeal process. The Court found, therefore, that the parish council and the local residents were deprived of the opportunity of consultation on the proposed amendment with the judge commenting: "What is the point of thus including third parties in the appeal process if they are later excluded from commenting on a proposed amendment which affects them? I take the view that by expressly providing for third parties to be heard on an appeal by written representations the Regulations by necessary implication given them the right to be informed of any amendment of the application for planning permission which materially affects them.[12]"

Holborn Studios[13]

26 This recent decision of the High Court deals with the power of the LPA to accept amendments to an application for full planning permission, during the determination process at the local level. Two of the questions raised for consideration by the Court were: "(a) in what circumstances may an application for planning permission be amended without notification of the amendment to others and (b) what test, or tests, should the court apply when reviewing the legality of such an amendment". This relevant because the approach of the Secretary of State on appeal is, in law and as explained in Wheatcroft, in the shoes of the Planning Authority.

27 The facts of the case are rather stark. The original application for full planning permission, made in 2015, was flawed due to an incorrect ownership certificate. Notwithstanding this, the application was advertised and consulted upon. Amongst others, Holborn Studios (HS) objected to the application on a number of points including disputing the applicant's claim that the proposals had been designed in conjunction with HS.

[11] Ibid
[12] Ibid, page 43.
[13] R(ex parte Holborn Studios Ltd) v The Council of the London Borough of Hackney & Ors [2017] EWHC 2823

28 In September 2015, the application was amended to change the applicant details. No site notice or press advertisement was provided and no invitation to make representations was given to anyone other than HS.

29 In May 2016, further amendments to the application were submitted. These were extensive in nature[14] and required the submission of 16 new plans. The revised application form contained a certification stating that HS had been notified; this was factually false. There was no press advertisement, no site notice or any other consultation about the revised application[15]. HS only became aware of the amended scheme, on reviewing the published Officers Report to Committee, and pressed for an adjournment to allow proper consultation to be undertaken. Representatives of HS attended to the Planning Committee, and objected to the proposals. Permission was subsequently granted by the LPA on November 8 2016.

30 The judgment of Mr John Howell QC sets out a number of salient points:

30.1 He distinguished between what he considered to be the 'substantive' and the 'procedural' constraints on the power of a LPA to grant permission for a development other than that for which an application was originally made.

30.2 Attention was drawn to the established position that, despite there being no statutory provisions for amendments, the Courts have accepted LPAs have the power to accept amendments to applications. He summarised: "The substantive limitation on the nature of the changes that may be made by an amendment appears whether the change proposed is substantial or whether the development proposed is not in substance that which was originally applied for, whether or not others have been consulted about the change"[16].

30.3 Referring to Wheatcroft, he noted that, "the authority may impose different conditions but only if they are conditions which could lawfully have been imposed on the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application[17]".

[14] See paragraphs 35 and 36 of the Holborn Studios (ibid) judgment for further details.
[15] Ibid; see paragraph 38 of the judgment.
[16] Ibid, paragraph 66.
[17] Holborn Studios, supra, at paragraph 68.

30.4 On the substantive limitation point, he concluded that, "These cases on section 73 of the 1990 Act illustrate the *substantive* limitation on the extent to which planning permission may be granted other than for the development which the application for planning permission was initially made. The limitation applies even though applications for planning permission under that section require notification and publicity…"[18].

30.5 Turning to the issue of *procedural* limitations, he held, "It is self-evident that any subsequent amendment to an application or the imposition of a condition that has the effect that the permission is granted for a development which is not that for which the application was made may deprive those notified and the public of the opportunity to make representations that the statutory scheme requires them to be given in relation to the application if it is to be entertained and determined…amendments cannot be made that would have the effect of sidestepping the rights of such third parties…"[19].

30.6 He went on to emphasise what he considered to be the importance of separating the substantive and procedural restrictions which control amendments to applications for planning permission, and stated (emphasis added), "*It is no doubt in the public interest that the substantive constraint on the changes that may be made to the application which a local planning authority has to the power to consider should* ***not be overly severe****…****On the other hand a relaxed approach to the procedural constraint on the making of changes would have consequences that would subvert the requirement for notification of, and publicity*** *for, an application for planning permission…*"[20].

30.7 The question of what level of re-consultation may be required, "When there is a duty of consultation…will depend inter alia on the purposes for which the requirement of consultation is imposed, the nature and extent of any changes and their potential significance for those who might be consulted"[21].

[18] Ibid, paragraph 69
[19] Ibid, paragraphs 70 and 71.
[20] Ibid, paragraph 74
[21] Ibid, paragraph 76

30.8 In considering whether re-consultation is required, the Court rejected the proposition that the correct test was that of whether an amendment involves 'fundamental change', or a 'substantial difference'. The Deputy Judge held that the correct test for considering re-consultation was whether, "*it is unfair not to re-consult*[22]" having regard to all of the relevant facts. He went on to find that the question of what fairness requires of a decision maker is a question for the Court to determine[23], having regard to the circumstances as they appeared to the decision maker at the relevant time[24].

31 It should be noted that although the Court in HS found that the LPA had failed, unlawfully, to undertake proper consultation there is no suggestion that the amendments proposed in 2016 would have failed to meet the 'substantive' control. Indeed, the Deputy Judge expressly noted that there are important public policy reasons why a relaxed interpretation of the substantive control should be adopted. In effect the judgement endorses the Wheatcroft point that there are two matters to consider; the substantive nature of the change (which should not be viewed in an overly severe way) and in addition and separate to that the procedural matter of consultation.

The Procedural Guide

32 There is little general advice within the Procedural Guidance as to its overall status. However, it is instructive to have regard to the 'Important Note' in Annexe L which states, "The content of this document is guidance only with no statutory status. This guidance is not definitive. "There is nothing to expressly indicate that the description of the status of the Procedural Guide is limited to the specific context of Annexe L.

33 It should also be noted that the Procedural Guidance was issued without public consultation being undertaken on its content. As such it differs materially from planning policy at both the national and local level.

34 In so far as is relevant to the issues in this case, the Procedural Guidance states:

34.1 "If, exceptionally, the appellant wishes to amend a scheme at the appeal stage, we will consider each request on its own merits."[25] Reference is then made to Annexe M, which is said to provide further information.

34.2 At Annexe M, relevant excerpts from the further information provided are as follows:

[22] Ibid, paragraph 79
[23] Ibid, paragraph 81
[24] Ibid, paragraph 86
[25] See paragraph 3.1.1, page 9, which is provided as a response to the question of, "Can a proposed scheme be amended".

34.2.1 "If an applicant thinks that amending their application proposals will overcome the [lpas] reasons for refusal they should normally make a fresh application. The [lpa] should be open to discussions on whether it is likely to view an amended scheme favourably";

34.2.2 "…the appeal process should not be used to evolve a scheme and it is important that what is considered by the Inspector is essentially what was considered by the local planning authority, and on which interested people's views were sought";

34.2.3 "Where, exceptionally, amendments are proposed during the appeals process the Inspector will take account of the Wheatcroft Principles when deciding if the proposals can be formally amended";

34.2.4 "…in some cases, even minor changes can materially alter the nature of an application and lead to possible prejudice to other interested people";

34.2.5 "The Inspector has to consider if the suggested amendment(s) might prejudice anyone involved in the appeal".

35 The Procedural Guidance does not provide any advice as to what is meant by the words, 'exceptional circumstances'. Unlike, for example the NPPG guidance on 'unreasonable behaviour' in connection with awards of costs, no illustrative examples are provided as to what may or may not constitute 'exceptional circumstances' on the facts of any particular case. The case law considered above does not introduce or endorse such a test.

Analysis

36 It is important to start from a clear acknowledgement of the factual context in which the question of amendments to applications arises in this case. This has been set out in the Relevant Background section of this note above. The Appellant has been given no opportunity to address matters raised by the Council after the appeal was lodged, but has expressly invited the Council to raise such matters if they existed, before the appeal was lodged, so that the appeal did not need to spend time dealing with them (see CD 16.1 a).

37 The Courts have established the need to consider the extent of change, which should look at whether the substance of the development has been altered as a matter of judgement. That judgement should not be looked at in an overly severe way and change should be acceptable so long as it doesn't alter the whole character of the application without looking at it in a narrow or over technical way. Secondly there is the procedural matter of consultation. This is a matter that remains fully capable of being addressed before the Inquiry and on which clarity can be achieved.

38 Given the sequence of events in this case, the Appellants were led to believe there was no need to submit further revisions to the scheme before the appeal was lodged. They had relied upon the comments from the Council as to what the issues of design and layout were. The application had gone past the period in which it should have been determined by a significant period and the Appellants had no proper knowledge of the LPAs concerns despite asking for them.

39 In such circumstances, it is easy to understand why it would be procedurally unfair for the planning authority to refuse the acceptance of an amended scheme. Simply put, the Appellant would be effectively denied the opportunity to respond to concerns which should properly have been raised during the determination of the application. Indeed, where the Secretary of State has the statutory power to deal with an appeal as if the application had been made to him directly, there is a clear mechanism in place to avoid the Appellant being deprived of this opportunity.

40 Further it is difficult to square the comment in the Procedural Guide and its use of the words 'exceptional circumstances' with the case law set out above. This language appears to impose an onerous burden on an Appellant who wishes to substitute amendments to an application. Such an approach would directly conflict with the direction of the House of Lords in *Inverclyde* that the imposition of 'technical rules' in such cases would be inappropriate.

41 Here, there are sound reasons why the Appellant's proposed plan substitution falls clearly within the scope both the substantive and procedural controls which apply to amendments of planning permissions as described in the cases above.

42 On the issue of substantive controls, although there are clear differences in the layout, these do not result in a fundamentally different or substantially changed application. On either plan, the application remains a scheme for the approval of permission for 250 dwellings, access, car parking, open space, hard and soft landscaping and other associated infrastructure. There is no alteration in the description of development, the proposed red line, the proposed quantum of development, or the provision of public open space. In other words, despite differences of detail, both layouts fall squarely within the description of development and one would be hard pushed to spot the differences without detailed scrutiny.

43 The Courts have also recognised that there is a public interest to be served in adopting a liberal approach to the question of whether an amended scheme is 'fundamentally different' to that which was applied for in the original application. A "liberal approach may enable planning permission to be granted without the need for a further new application to be made and without further delay and costs for the applicant, the authority and others".[26] In *Wessex RHA*[27], it is noted that Glidewell J reached his determination that the Inspector had not fallen into an error of law and expressly appreciated, "the practical advantages of dealing, when there was a substantive public inquiry, with as many matters as possible, and so far as possible, achieving some finality"[28].

44 It is, of course, ultimately a matter of judgment, and entirely within the decision maker's discretion, to determine whether the amended layout constitutes a 'fundamentally different' application from that originally made. However, it is difficult on the facts to conceive of a reasonable argument which would justify a finding that the revised scheme in this case involves a 'substantial change'.

45 The question of whether the procedural controls, which stem from the Wheatcroft principles, would prevent the lawful acceptance of the plan substitution can be answered clearly in the negative, particularly given the time between the Inspector's telephone conference call on 4 February 2020 and the Inquiry on 24 March 2020 (7 weeks) can be used to allow those who were advised of the appeal and consulted on the application to be made aware of the changes, particularly bearing in mind that only three representations have been received from the public in this case. The Council will also have ample time to consider the plans.

46 Taking all of these points together, there is no procedural obstacle, as a matter of law, which would preclude the acceptance of the amended layout.

47 It is clear from a full analysis of the relevant law that the proposition in the Procedural Guide that 'exceptional circumstances' need to be demonstrated before a scheme may be amended at appeal, has no pedigree. It is unclear where this wording has been drawn from. Care should be taken in the exercise of any 'exceptional circumstances' test when considering the discretion to accept amendments to appeal schemes. Notwithstanding, given the facts of this case it would meet any such requirement.

Conclusion

[26] Holborn Studios, supra, at paragraph 73.
[27] Supra
[28] ibid

48 To conclude, on the facts of this case there is no legal bar (whether substantive or procedural) to the Appellants proposed substitution of a revise layout. Although matters of discretion ultimately fall to be determined by the decision maker (the Inspector on behalf of the Secretary of State), when all of the relevant facts are taken into account it is difficult to conceive of any reasonable outcome other than the acceptance of the revised layout which the Appellants wish to substitute.

WALKER MORRIS LLP