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BY EMAIL ONLY

COPY TO: James Hughes; Paul Moore; Mandy Lewis

Date
20 October 2023

Our reference
UEJT/UJTB/TRA170.U3

Your references
22/01410/FUL

Dear Snowber,

Proposed redevelopment of site comprising the demolition of all existing units and erection of new storage and distribution units (Use Class B8) with ancillary office space, vehicular, pedestrian and cycle access, external yards, parking, landscaping and associated works under application 22/01410/FUL (the "Planning Application")

1. Introduction

- 1.1 We write on behalf of our client, Trammell Crow Company Logistics (Heywood) Limited (our "**Client**") in relation to its Planning Application for development at Heywood Stores, Manchester Road, OL10 2QR (the "**Property**"), and further to our letter of 3 October 2023. Save where otherwise defined, we adopt the defined terms used in that letter.
- 1.2 We have now received a copy of the Second Russell Homes Letter dated 27 September 2023 (hereafter referred to as the "**RH Objection**") and the letter from JLL dated 26 September 2023 (the "**JLL Letter**") that accompanied it.
- 1.3 We understand that you are advising the Council with regards to any legal points arising from those letters and our Client's Planning Application. We also understand from Mandy Lewis that the Council will not commit to a date when the matter will be put before Committee.
- 1.4 We do not consider that anything in the RH Objection or the JLL Letter (or, for completeness, the First Russell Homes Letter) warrants the delay that our Client's Planning Application has been and is being subject to. We set out below the key case law concerning the exercise of planning judgment by local authorities, and enclose a legal opinion prepared by Paul Tucker KC regarding the matters raised in the RH Objection (the "**Legal Opinion**"). For the avoidance of doubt, we agree with Mr Tucker KC's assessment that the RH Objection is a commercial objection that should be viewed with a degree of circumspection.
- 1.5 We also deal with the need to determine our Client's Planning Application promptly, and remind the Council that the latest agreed deadline to determine the Planning Application

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has expired. Accordingly it is open to our Client to bring an appeal against non-determination and our Client reserves its rights in this regard.

2. The Exercise of Planning Judgment by the Council

2.1 Russell Homes contends that it is "*incorrect*" for the Officer Report to attribute "*some limited weight*" to the impact of the Planning Application on the South Heywood Masterplan and Russell Homes' hybrid planning permission with reference 16/01399/HYBR (the "**Russell Homes Permission**").

2.2 It is not for Russell Homes to assert the weight to be attributed to specific material planning considerations. As espoused in Lindblom J's judgment in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government, Hinckley and Bosworth Borough Council* [2014]:

"The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all"¹."

2.3 Wednesbury unreasonableness is a high bar. The reasoning or decision must be so unreasonable that no reasonable authority, acting reasonably, could have made that reasoning or decision. Clearly it is not relevant here as the Officer Report has assessed the potential impacts of our Client's Planning Application and has reached a reasoned conclusion that the development accords with the development plan and should be granted planning permission.

2.4 Even if another officer may have attributed a different degree of weight to the Russell Homes Permission, this would not be sufficient to render the grant of our Client's Planning Application unreasonable. As commented on by Lindblom J in the circumstances of the matter under consideration in *Bloor Homes*:

"I cannot say that this was an unreasonable judgment for the inspector to make. Other inspectors might have taken a different view in the same circumstances. There might have been good reasons for doing so. But that is not enough to sustain a challenge before the court. It lies within the territory of planning judgment, and the court will not go there."

2.5 Russell Homes' assessment of the weight to be attached to the impact of our Client's Planning Application on the South Heywood Masterplan and the Russell Homes Permission is irrelevant, and the RH Objection and JLL Letter do not identify any matter of planning judgment in the Officer Report that could be objectively judged to be unreasonable, let alone Wednesbury unreasonable.

3. Unwarranted Delay to the Determination of the Planning Application

3.1 No new issues of substance are included in the RH Objection or the JLL Letter which justify the initial decision to defer our Client's Planning Application from consideration by the

¹ The words in additional quotations marks are quotations within that judgment taken from the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995].

Committee on 27 September 2023, nor the failure to have included it on the agenda for consideration this month.

- 3.2 We note the veiled threat of a judicial review challenge in the First Russell Homes Letter and would draw your attention to the extract from R. (on the application of Noble Organisation Ltd) v Thanet DC [2005] EWCA Civ 782 at paragraph 5 of the Legal Opinion and Auld LJ's "*dissatisfaction at the way the availability of the remedy of judicial review can be exploited — some might say abused — as a commercial weapon by rival potential developers to frustrate and delay their competitors' approved developments*". While our Client's Planning Application has not yet been granted it is evident that the threat of a judicial review challenge is being used as a tool to delay determination of the Planning Application, jeopardising the substantial planning benefits identified in the enclosed letter from Gerald Eve.
- 3.3 As identified in the Officer Report, the Council has a duty under the National Planning Policy Framework to approve proposals that accord with the development plan without delay. The case officer assigned to the Planning Application has concluded that the Planning Application accords with the development plan, and a report recommending approval is ready to be put before Committee, and has been since mid-September.
- 3.4 Since 27 September our Client's contact with the Council has been extremely limited, notwithstanding our Client's repeated attempts to progress matters. The agreed deadline for determination of our Client's Planning Application has expired and in light of the Council's refusal to commit to the matter being brought before Committee on or before the November Committee date, our Client is considering its options with regards to an appeal against non-determination.
- 3.5 To the extent that the Council considers it necessary to obtain external legal advice with regards to the content of the RH Objection and the JLL Letter, it has had ample time to do so, and by the November Committee date almost two months will have passed since the Planning Application should have been determined.
- 3.6 Further delay is unnecessary, unacceptable, and would represent a failure on the part of the Council to meet its obligations under the National Planning Policy Framework.

4. Conclusion

- 4.1 The latest representations made by Russell Homes contain no new issues of substance. As detailed above and in the Opinion, the weight to be attributed to material considerations is a matter of planning judgment on which the courts will not intervene. That Russell Homes disagrees with the weight attributed by the case officer is irrelevant.
- 4.2 We ask that the Council urgently liaises with our Client to progress this matter and agree that the Planning Application will be put before Committee at or before the scheduled November Committee meeting.
- 4.3 Should you consider that there is any impediment to the Council doing so we ask you to alert us as soon as possible.

Yours sincerely



Taylor Wessing LLP

Encs.

1. Letter from Gerald Eve dated 20 October 2023
2. Legal Opinion

**RE: THE PROPOSED REDEVELOPMENT OF THE HEYWOOD STORES SITE,
MANCHESTER ROAD, HEYWOOD.**

FURTHER OPINION

1. We are again asked to advise the Trammell Crow Company (“TCC”) in relation to the application for the redevelopment of the Heywood Stores site on Manchester, Road, Heywood. We would refer to our previous advice in this matter tendered on divers dates both in writing and in consultation.
2. Given the familiarity of the background to this matter only the most salient recent events are rehearsed below.
3. Russell Homes have submitted a further objection against TCC’s undetermined application to the Council in a letter dated 27th September 2023, asserting that to grant TCC’s planning application would “preclude” delivery of Phase 4 of the South Heywood Development for which Russell Homes has the benefit of outline, but not detailed planning permission. The letter appends a short analysis from JLL which is said to support some of the concerns set out in the letter of objection. The principal concern in the letter is the officer’s report is in error by ascribing no more than “some limited weight” to the claimed impact on the delivery of their residential scheme. Russell Homes contend that significant weight should be given to the concerns they express, and claim a variety of adverse consequences which would preclude the delivery of at least 330 houses on their site.
4. There are a number of short and complete answers to the points in the late objections:

- a. There is no meaningful evidence to support Russell Homes' assertions. The adverse impact is said to arise from the relative locations of the TCC scheme and the residential component of Russell Homes' scheme. This is another way of making the same assertion about the supposedly unacceptable relationship between the two schemes as was made in Russell Homes' previous argument about the TCC's scheme's effect upon character and appearance. The officer report properly addresses the issue of the relationship of the two schemes and reaches a robust judgement about the acceptability of that relationship, having regard to the separation distance of the two schemes, the relative heights, the landscaping and other mitigation proposed by TCC and all other relevant aspects of the two schemes. There is simply no evidence to show that any of the 330 homes would be lost from the Russell Homes scheme if the TCC application were to be approved. If there would be no unacceptable effect on amenity, then there is no reason to think that the Russell Homes' scheme's viability would be prejudiced. The argument is just a "rebadging" of a previously failed argument;
- b. It is factually incorrect to claim that Ryder Landscape Associates "confirmed"¹ that the TCC scheme would have significant impacts. It said no such thing;
- c. It is not the planning authority's job to ensure the maximum value for the residential scheme on the Russell Homes site. The Russell Homes scheme's likely altered value is a matter of indifference unless it was clearly demonstrated

¹ See page 2 of the latest Russell Homes letter.

that it gave use to clear land use consequences. The Council's role is not to guarantee Russell Homes any particular level of profit;

- d. The Jones Lang Lasalle letter accompanying the Russell Homes objection similarly contains unjustified assertions. It wrongly claims that *“technical consultants acting on behalf of the Council, have also raised major issues with the scale, massing and height of development and its impact on the area”*. It also claims that, in addition to visual issues, the TCC scheme would raise highways and noise issues that cannot be mitigated against. There are two answers to that: (i) JLL's expertise in those areas is unstated and (ii) the consultees who do have expertise in those areas robustly disagree and consider that such impacts can be mitigated.
- e. JLL's claim that the TCC scheme would *“prejudice sales and homeowner demand”* for what is said to be an expectation of a 'high value' which is also unsubstantiated assertion, but again appears to relate to an impact upon Russell Homes' expected return from the site, which as noted above is a matter of indifference without more;
- f. Whilst the objection contends that there would be an impact upon the viability of the Russell Homes scheme, the only evidence relates to what was considered viable at a point in time which has given rise to a consent whose triggers have been carefully considered and fixed. Russell Homes hasn't even secured reserved matters consent on this parcel of land so as to enable viability to be properly reassessed. Nor is it remotely explained why development which

would not adjoin the TCC site would be in any way affected by the change in the visual character of the TCC land. The objection is forthright in its tone, but lacks a meaningful evidence base to justify the propositions contained within it; and

- g. There is, in any event, no “right” answer to the amount of weight to afford to a material consideration, as that is a matter of planning judgement for the decision maker. There is no legal defect in the officer report as to how this issue should be approached by the Planning Committee and the judgement reached is a robust one.

- 5. Russell Homes objection is tantamount to an objection from a commercial rival which is candid, at least in the JLL letter to the effect that what is at stake is the reduction in return from what would otherwise be a ‘high value’ site. Such commercial objections should be viewed with a degree of circumspection. As the Court of Appeal noted in the context of a commercially motivated judicial review in the case of *R. (on the application of Noble Organisation Ltd) v Thanet DC* [2005] EWCA Civ 782:

“I would dismiss the appeal. In doing so I add a note of dissatisfaction at the way the availability of the remedy of judicial review can be exploited — some might say abused — as a commercial weapon by rival potential developers to frustrate and delay their competitors' approved developments, rather than for any demonstrated concern about potential environmental or other planning harm. ... This may be the cause of great economic harm to individual developers and, more importantly, it is likely to frustrate the public interest in much needed regeneration However seemingly complicated the issues

are, or how sophisticated and technical the statement of facts and grounds supporting the initial claim for judicial review, they should be subject to rigorous examination ...”

6. It is not the role of the planning system to mediate the commercial expectations of rival businesses. To the contrary at the heart of the planning system is that it is only warranted to inhibit the use of private land if it is in the public interest to do so. In this instance it is perhaps of note that the officers report records that the TCC proposals will provide significant economic benefits to the local area and will provide for a form of development for which there is an immediate and clear shortage on a site which is previously developed and within the development boundary. It is of some note that these significant public benefits are not mentioned in either letter and are therefore presumably undisputed by Russell Homes.
7. It is our firm view that the latest objection from Russell Homes is unmeritorious and does not provide a sound basis for a decision to be reached which is at odds from the carefully articulated officer recommendation of approval.

PAUL G TUCKER KC

MARTIN CARTER

20th October 2023.

Kings Chambers

Manchester – Leeds – Birmingham.