Case Name: *Schneck v Secretary of State for Levelling Up, Housing & Communities & Anor* [2022] EWHC 3335 (Admin) (21 December 2022)

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Commentary: This High Court case concerned a challenge under section 288 of the Town & Country Planning Act 2008 by Mountley Limited (the "Claimant") to the decision of an Inspector to dismiss an appeal of West Berkshire District Council's refusal of planning permission. Mr Tim Smith, sitting as a Deputy High Court Judge, held that two of the Claimant's three grounds (grounds 1 and 3) succeeded, and dismissed ground 2. The case affirms the flexibility in local and national policy regarding reduced affordable housing delivery on viability grounds, and demonstrates a successful use of a "fall-back" argument as a material consideration.

The site in question, known as Emerald House in Newbury Business Park, was originally an office block, but had been partially converted under permitted development rights to create a mixed commercial and residential property including 109 flats. The Claimant then applied for permission for the erection of a new floor on top of the existing building to provide an additional 13 flats. The Local Planning Authority, West Berkshire District Council ("WBDC"), rejected the application, and the Inspector dismissed the Claimant's appeal. The Claimant challenged the Inspector's decision on three grounds: (1) errors in the conclusions on affordable housing, (2) errors in the conclusions on flood risk, and (3) errors in the treatment of the Claimant's "fall-back" argument. Each point is considered in turn below.

1 – provision of AH:

The Claimant had provided evidence to suggest that no affordable housing provision was viable, but offered to pay £25,000 as a financial contribution. WBDC refused permission, with the single reason for refusal being that the development was "contrary to" Policy CS6 of West Berkshire Core Strategy 2021, which set a policy target of 30% for the development, and "fail[ed] to comply with" the recommendations of the NPPF "which requires the delivery of affordable housing on major development sites".

The Claimant submitted to the Inspector that Policy CS6 was expressly "subject to the economics of provision", and that that there can be a "negotiation" around the level that will actually be provided, so long as any reduced delivery is "fully justified by the applicant through clear evidence". Similarly, the Claimant noted that paragraph 58 of the NPPF gives discretion to the decision-maker on how much weight to be given to a viability assessment. The Inspector accepted these points and the viability evidence provided, but was unconvinced that a "proper negotiation process" had been undertaken to secure optimum delivery and the development was therefore contrary to Policy CS6. He deemed the proposed £25,000 contribution to be the start of a negotiation that was then not completed.

The High Court judge took a different view and held that Policy CS6 was not breached: once it was accepted that it was unviable to offer any affordable housing, the policy was met. The £25,000 offer was simply a "goodwill gesture of nominal value", which did not affect the policy position and was not the start of a negotiation process. In his view, this position would dissuade developers from making any voluntary offers beyond what the policy requirement. Therefore, the Claimant's ground 1 succeeded.

2 – flooding:

WBDC were satisfied on this issue; however, at appeal the Inspector found that paragraph 067 of the PPG required both the Sequential Test and Exception Tests to be passed, and noted that the flood risk assessment submitted by the Claimant did not contain a Sequential Test. The Claimant then commissioned a further report; nevertheless, the Inspector was unable to find compliance with the Sequential Test, holding that there was insufficient information to show how the proposal demonstrated there were no suitable alternative sites at lower risk of flooding.

The High Court judge held that the Inspector had carried out a legitimate exercise of planning judgment; the additional 13 units were not so dependent upon the existing building that they could not be accommodated anywhere else. Accordingly, the Claimant's ground 2 was dismissed.

3 – fallback argument:

The Claimant had submitted to the Inspector that the imminent new Class AA under the GPDO, which allowed construction of up to two additional storeys to dwellinghouses already more than two storeys, was a "fall-back" position and therefore a material consideration. The Inspector accepted this position was a material consideration, but attached limited weight to it. The Claimant argued before the High Court that the Inspector had made an error in applying a test based on certainty. Permission on this ground was originally refused when considered on the papers by Neil Cameron KC (sitting as a Deputy High Court Judge) but the Claimant renewed his application for permission to proceed on this ground, and it was agreed this issue would be dealt with in parallel with the substantive hearing of grounds 1 and 2.

The High Court judge cited *R (Zurich) v Lincolnshire Council [2012] EWHC 3708,* which elaborated on the "fall-back" argument established from the *Samuel Smith Old Brewery* case: *"The prospect of the fall back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Where the possibility of the fall back position happening is "very slight indeed", or merely "an outside chance", that is sufficient to make the position a material consideration".* He noted that the Inspector had only dealt with this point briefly and held that the Inspector had failed to

grapple with the submission that prior approval would at least be likely to have been granted. Therefore, the reasons given by the Inspector on this point were "wholly inadequate", and ground 3 succeeded.

The judge then invited parties to agree an appropriate form of Order.

Case summary prepared by Jed Holloway