

BIRD IN EYE FARM, BIRD IN EYE HILL, FRAMFIELD

OPINION

INTRODUCTION and SUMMARY

- 1 I am instructed by Croudace Homes Ltd (“Croudace”). On 31 July 2024, Croudace submitted a planning application [WD/2024/1799/O] (“**the Application**”) to the local planning authority (Wealden District Council (“**the Council**”)) in respect of land at Bird in Eye Farm for the erection of up to 190 dwellings with associated works, parking, landscaping, publicly accessible open space and SANG provision, with access from the B2102. By letter dated 19 August 2024, the Council invited Croudace to comment on whether it could and should decline to determine the Application pursuant to section 70A of the Town and Country Planning Act 1990 (“**TCPA**”)¹.
- 2 The Council’s invitation to comment on possible exercise of section 70A powers presumably arises from an appeal decision dated 12 October 2023 (appeal ref: APP/C1435/W/22/3307820) relating to a site encompassing most (but not all) of, and otherwise far more extensive than, the Application site, and proposing erection of up to 290 homes, associated landscaping, informal open space and strategic SANG, with access from the B2102. The Inspector dismissed Croudace’s non-determination appeal and, on a number of scheme-specific grounds, refused planning consent for the “**Refused Application**”. The appeal decision cannot reasonably be construed as being founded on an “in principle” objection to an appropriately scaled and justified residential development at Bird in Eye Farm, indeed it can be noted that there was no landscape objection to the Refused Application and that the Inspector concluded that the site was or was capable of being made locationally sustainable for residential

¹ TCPA contains various other grounds on which a local planning authority may decline to determine a planning application, but it appears to be common ground these powers are not even potentially engaged. They are not therefore considered further in this Opinion.

development given proximity and connections to Uckfield. The Application reflects a revised scheme intended to address the Inspector's concerns. A pre-application process was engaged in with the Council in respect of a possible application for up to 235 new homes, resulting in a 4 June 2024 letter of advice from the Council. That letter did not indicate that the Council had any "section 70A concerns", and the Application scheme has been further reduced in scale from the pre-application scheme with a view to addressing points made in the Council's letter.

- 3 In these circumstances, I am asked to advise whether a decision by the Council to decline to determine the Application would be lawful. In my view, any such decision to decline to determine the Application would be unlawful and amenable to a quashing order on an application for judicial review. In particular:

- 3.1 It cannot rationally be concluded that the Application and the Refused Application are "similar" (as defined at section 70A(8)).
- 3.2 It cannot rationally be concluded that "there has been no significant change in the relevant considerations" since the appeal decision (sections 70A(1)(b) and 70A(6)).
- 3.3 There are material considerations arising from national Government policy which must be taken into account in relation to any exercise of a discretion to decline, and on available information it is not possible to identify a rational basis on which genuinely taking account of such material considerations could be consistent with a decision to decline. Further or alternatively, the relevant material considerations create a legitimate expectation that determination of the Application will not be declined, and there is no rational basis on which a departure from that legitimate expectation and the ensuing unfairness to Croudace could be justified.

LEGAL CONTEXT and RELEVANT POLICY GUIDANCE

4 So far as presently material, section 70A of the TCPA provides as follows:

- “(1) A local planning authority may decline to determine a relevant application if:
 - a. Any of the conditions in subsections (2) to (4) is satisfied, and
 - b. The authority think there has been no significant change in the relevant considerations since the relevant event.

- “(2) The condition is that in the period of two years ending with the date on which the application mentioned in subsection (1) is received the Secretary of State has refused a similar application made to the Secretary of State under section 62A or referred to him under section 76A or 77.

- “(3) The condition is that in that period the Secretary of State has dismissed an appeal:
 - a. Against the refusal of a similar application, or
 - b. Under section 78(2) in respect of a similar application.

- “(4) The condition is that:
 - a. In that period the local planning authority have refused more than one similar application, and
 - b. There has been no appeal to the Secretary of State against any such refusal or, if there has been such an appeal, it has been withdrawn.

- “(4A) A local planning authority in England may also decline to determine a relevant application if:
 - a. The condition in subsection (4B) is satisfied, and
 - b. The authority think there has been no significant change in the relevant considerations since the relevant event.

- “(4B) The condition is that:
 - a. In the period of two years ending with the date on which the application mentioned in subsection (4A) is received the Secretary of State has refused a similar application,
 - b. The similar application was an application deemed to have been made by section 177(5), and
 - c. The land to which the application mentioned in subsection (4A) and the similar application relate is in England.

- “(5) A relevant application is:
 - a. An application for planning permission for the development of any land
 - ...

- “(6) The relevant considerations are:
 - a. The development plan so far as material to the application;
 - b. Any other material considerations.

- “(7) The relevant event is:
- a. For the purposes of subsections (2), (4) and (4B) the refusal of the similar application;
 - b. For the purposes of subsection (3) the dismissal of the appeal.
- “(8) ... an application is similar to another application if (and only if) the local planning authority think that the development and the land to which the applications relate are the same or substantially the same.”

- 5 So far as I am aware, there is no basis on which it could be suggested that any of the conditions in subsections (2), (4) or (4B) is satisfied. As regards the condition in subsection (3), dismissal on appeal of the Refused Application occurred in the last 2 years and disposed of an appeal under s78(2) of TCPA. Accordingly, questions as to similarity of application; significant change in relevant considerations; and discretion to decline to determine need to be considered.
- 6 As regards national policy on the exercise of discretion to decline to determine an application, since the NPPG was introduced (March 2014) it has contained the following at what is paragraph 14-058-20140306:

“Must a local planning authority decline to determine repeat planning applications?”

Where an authority considers that an application is similar, it is not automatically obliged to decline to determine the application. The purpose of these powers is to inhibit the use of ‘repeat’ applications that the local planning authority believes are submitted with the intention of, over time, wearing down opposition to proposed developments. They are, however, designed to be flexible and to give local planning authorities the discretion to entertain ‘repeat’ planning applications where they are satisfied that a genuine attempt has been made to overcome the planning objections which led to rejection of the previous proposal or there has been a material change in circumstances.”

- 7 In *Jeeves v Gravesham BC* [2007] 1 P&CR 15, Collins J considered, in a case where he had concluded that the LPA had lawfully assessed there had been “no significant change in the relevant considerations”, the terms of para 5 of Circular 14/91, which set out (albeit in slightly different language) a comparable approach and policy justification to PPG 14-058 as to when any discretion to decline should be exercised (and when not). Collins J concluded at [32-33] that the LPA’s claim to have taken account of the relevant policy was not justified where, despite claiming to have taken it into account, in reality

and in substance what the LPA had done was emphasise the similarity of the various applications as distinct from identifying any basis on which the most recent application was abusive and/or submitted to wear down opposition rather than comprising a bona fide attempt to address previous objections.

- 8 At [35], Collins J explained the relevance of this to the lawfulness of a decision to decline to determine an application:

“What then is the effect of that? The guidance, of course, does not and cannot override the terms of the statute. On the other hand, the purpose behind the guidance is to indicate to local planning authorities how they should exercise the discretion that they have with a view to ensuring that there is a consistent approach countrywide to applications for permission. It is clear that in reaching a decision under s.70A the existence of and the terms of the guidance are a material consideration which the relevant authority should take into account. Here, as it seems to me, Mr Gilbert [the relevant planning officer] purported, according to his statement, to take it into account but was wrong in his approach. He misconstrued the guidance and what he did was not in accordance with that guidance. The claimant was entitled to expect that there would be compliance with the guidance. To put it in terms which are familiar to judicial review cases, he had a legitimate expectation that that guidance would be applied. Of course, if a particular authority takes the view that it wishes to modify its approach, it may be that it would be entitled to do so, but only if it made it clear in advance that that is what it was going to do.”

- 9 Collins J accordingly quashed the LPA’s decision. I return to the *Jeeves* judgment below.

LEGAL ANALYSIS

[1] Is the Application “similar” to the Refused Application?

- 10 Similarity for relevant purposes is defined at s70A(8) as “if (and only if) the local planning authority think that the development and the land to which the applications relate are the same or substantially the same”. As recognized by Collins J in *Jeeves*, a statutory formulation of this nature provides a measure of latitude to the Council, but this is subject to ordinary judicial review principles, in particular to take account of material considerations (and ignore immaterial ones) and to reach a conclusion which

is within rational bounds (ie, which a reasonable LPA, acting rationally, could reach on the material before it).

- 11 It should also be noted that both the “development” and “the land” must rationally be concluded to be the same or substantially so.
- 12 In my view, when comparing the Refused Application and the Application, it cannot rationally be concluded that either the “development” or “the land” are the same or substantially the same.
- 13 As regards “the development”, they are plainly not “the same or substantially the same” where:
 - 13.1 The number of homes proposed is reduced by around one third from a maximum of 290 to a maximum of 190. By itself, this is a fundamental change in the development proposed.
 - 13.2 The Application proposes c8.7ha of SANG, principally to address the needs of the development (although in spatial terms the scheme exceeds minimum requirements by a respectable margin, as explained in the supporting reports). By contrast, the Refused Application was fundamentally different. It proposed a strategic SANG of 26.17ha, intended to be made available for an additional 1073 new homes over and above the 290 homes proposed. The SANG car park proposed in the Refused Application also does not feature in the Application, having been replaced by the LEAP (which, in the Refused Application, was due west of the Oast House).
 - 13.3 The Application proposes vehicular access by way of a new roundabout, a materially different physical arrangement to that which formed part of the Refused Application.
- 14 As regards “the land”, they are also plainly not “the same or substantially the same”. The Refused Application’s redline boundary extended to c41 hectares (42.7ha less the excluded Bird In Eye Farm area). By contrast, the Application’s redline boundary

extends to c20 hectares, a 50% reduction. While the different redlines principally reflect reductions for purposes of the Application, the Application now incorporates an extension into Bird in Eye Farm (around the Oast House) in order to facilitate setting improvements to the immediate context of the listed building. In addition, it can be noted that the Application proposes no works within the ancient woodland (unlike the Refused Application's proposed path/replacement bridge). Further, the development area for residential and associated infrastructure is much reduced, reflecting the c33% reduction in new homes proposed, at 6.2ha in the Application (down from 8.65ha in the Refused Application).

- 15 In my view, it would be demonstrably insufficient simply to identify that the Application proposes housing and SANG (with associated infrastructure). Scale of development and extent of land-take are plainly material. Here the differences are so significant that there cannot, in my opinion, be a rational (and hence lawful) determination that the Refused Application and the Application are “the same or substantially the same” in relation to either “development” or “land”.

[2] Has there been a significant change in “relevant considerations”?

- 16 Even if (contrary to my view) the “similarity” test were surmounted, the s70A discretion does not arise unless the Council “think there has been no significant change in the relevant considerations since the” appeal was dismissed, with “relevant considerations” defined to include (as well as the development plan) “any other material considerations”: see sections 70A(1)b and 70A(6).
- 17 Again, in my view, and notwithstanding the measure of appreciation available to the decision-maker where opinions could reasonably differ, the Council cannot rationally conclude that this test is satisfied.
- 18 In this context, it is most convenient to consider how the Application has sought to address each of the adverse conclusions in the appeal decision:

- 18.1 Highway safety. The Application includes a fundamentally different access proposal, prepared by new consultants. Instead of the T-junction proposal criticized by the Inspector at DL31-36, a roundabout (with cyclists accommodated appropriately) is proposed. As explained in the Transport Assessment accompanying the Application, the new highway consultants regard this scheme as safe and suitable, and as addressing the deficiencies of the earlier scheme. Whether this is determined to be so will need to be considered in the course of the Application's assessment. But there are plainly new significant material considerations put forward in consequence of the genuine attempt made by Croudace to address these aspects of the Inspector's decision letter.
- 18.2 Heritage (impact on setting of the Oast House). The Inspector's conclusions as to the Refused Application's impact on the Oast House's setting are (as evident from a comparison of the various illustrative/parameter plans and the Heritage Report submitted in support of the Application) sought to be addressed in a number of ways. Without listing all such considerations, relevant changes include (a) the substantial stepping back of the development envelope to the west and south-west of the Oast House thereby creating an extensive and (for the first time) publicly accessible viewing corridor across a wide vista, and (b) proposed improvements in the immediate setting of the Oast House (to its north and west) involving the replacement of existing gravel and concrete areas with green landscaping. These matters are, of themselves, significant changes in circumstances. Croudace's new heritage consultants (Montagu Evans) consider that the revised scheme preserves the setting of the Oast House such that there is no relevant harm. Alternatively, even if there is LTSH, it is at the lower end of the scale (per Montagu Evans), and Croudace considers that the new heritage balance (NPPF, §208) for the Application falls to be answered favourably (from its perspective). For present purposes, it suffices to note that a genuine attempt is being made to surmount the Inspector's relevant adverse conclusions on the basis of the revised specifics and circumstances of the Application. These, in my view, demonstrably amount to new and significant material considerations, and the contrary cannot rationally be concluded.

- 18.3 Impact on ancient woodland and ecological interests. The Application responds to DL15-30 of the appeal decision in a number of ways. Notably, (a) the proposal for a path through the ancient woodland is abandoned, so that these potential direct impacts on the woodland itself and protected species within it fall away, (b) the buffer between the ancient woodland and built development has increased so that at all points it is at least 50m (to the edge of the nearest road), a material increase on the c28m equivalent minimum buffer proposed for the Refused Application, and (c) the part of the buffer which is the closest 15m to the ancient woodland will contain no footways (again, a change from the Refused Application). Once more, there is plainly a genuine attempt to engage with and respond to the Inspector's concerns. The Application is a fundamentally revised proposal in material respects.
- 18.4 Flooding sequential test. DL41 concluded that a sequential test was required and that the submitted sequential test was inadequate. The Application seeks to address this conclusion with the submission of a new sequential test assessment prepared by RPS², specifically tailored to the relevant circumstances and specifics of the Application and fundamentally different from the document considered by the Inspector. Again, there are plainly new significant material considerations and a genuine attempt to address the Inspector's concern in the context of what is proposed in the Application.
- 19 Accordingly, it cannot in my judgment credibly be suggested that there has not been a genuine attempt to engage with and respond to the various adverse conclusions in the appeal decision. On this basis, it is impossible rationally to conclude other than that "material considerations" have significantly changed, and the revised scheme and associated justifications need to be appraised and adjudicated on their merits.

² The RPS report was referenced in the Planning Statement at §3.1, but may have inadvertently been omitted from the documents submitted to the Council with the rest of the planning application. I am informed that this was rectified, and the RPS report provided (or re-provided) to the Council, at 11.21am on 22 August 2024.

[3] Are there other relevant considerations material to any exercise of discretion (should it arise)?

- 20 Even if my responses to questions 1 and 2 above are wrong, the Council would not be compelled to decline to determine the Application, but it would need to consider in its discretion whether to do so. As is clear from *Jeeves*, considerations material to that exercise of discretion need to be taken into account. These would include matters such as (a) the Council's affordable housing need position, (b) the Council's housing supply position more generally, taking account of the fact that it is common ground that greenfield sites will be required to meet future housing needs, (c) the draft NPPF currently being consulted on, in particular proposals to roll back provisions such as NPPF §226 (as the new Government's election manifesto proposed), (d) the absence of an in principle objection to residential development at Bird In Eye Farm, and the Inspector's conclusion that the site is or can be made locationally sustainable, and (e) what good reason there would be to decline to determine the Application now, when a resubmission in 14 months would fall outside the temporal parameters of section 70A.
- 21 In addition, the policy explained at PPG 14-058 must be grappled with. (I have not been made aware of the Council having consulted on and adopted some departure from this policy.) Consistent with Collins J's approach in *Jeeves*, failure to provide a coherent reason why the policy is inapplicable or a compelling justification as to why Croudace's legitimate expectation that it would be applied should be overridden notwithstanding the unfairness this would demonstrably cause (see generally De Smith's Judicial Review [9th Ed] at 7-054ff) would make a decision to decline to determine unlawful.
- 22 In my view, on available information, and taking account of what is said above in this Opinion:
- 22.1 The policy at PPG 14-058 is engaged and is to the effect that the Application must be determined on its merits. It would be preposterous to suggest that the Application is an abusive repeat application intended to wear down opposition, or anything other than a "genuine attempt" to address the reasons why the Refused Application failed.

- 22.2 There is no reason whatsoever that could justify overriding Croudace's legitimate expectation that the policy in question should be followed and applied.
- 23 For these reasons, it is not presently possible to see how any discretion under section 70A (if arising) could rationally (and thus lawfully) be exercised in favour of declining to determine the Application.

CONCLUSION

- 24 My views on the principal issues arising are summarised at paragraph 3 above. A decision by the Council to decline to determine the Application would, in my judgment, be unlawful, and amenable to a quashing order on an application for judicial review.
- 25 For completeness, I note that the Council's 19 August 2024 letter suggests that the Council would be entitled to retain the fee for the Application even while declining to determine the same. This is not correct. While TCPA does not provide expressly either way whether the fee is returnable or forfeit, on ordinary equitable principles the money would be returnable in the event of a total failure of consideration. However, in light of the clear conclusion I have reached as to whether a decision to decline to determine would be lawful, this does not arise.

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