Jockey Club Estates Limited

Racing Housing and Affordable Housing

O P I N I O N

1. I have been asked to advise Jockey Club Estates Limited ("**JCEL**"), which is the freehold owner of land at Newmarket. It is currently preparing planning applications to submit to Forest Heath District Council ("**FHDC**") for 150 houses for racing staff on two sites:

   (1) a greenfield site off Leaders way and Sefton Way proposed to be allocated in the Preferred Options[1] for the Forest Heath Site Allocations Local Plan (Site N1(d)) for housing to "meet the needs of people employed in the Horse Racing Industry"; and

   (2) an adjacent site where there is existing residential development at Phillips Close, Newmarket with no policy restrictions applicable proposed as Site N1(f) in the Preferred Options.

2. I have been sent a draft Lettings Policy so far agreed between JCEL and the housing team at FHDC, which includes a definition of those who will qualify to occupy the dwellings under a racing-related occupancy restriction. It is intended that both racing-related market housing and racing-related affordable housing will be included in the proposed development.

3. Simon Phelan, the Head of Housing at FHDC, raised the concern that recent case law may prevent affordable housing being restricted to a certain sector of society as proposed in FHDC's Lettings Policy. He has referred to the case of ***R (H and others) v Ealing LBC*** [2016] H.L.R. 20.

4. I am therefore asked to advise JCEL generally and with respect to the following issues:

[1] JCE has made representations concerning certain aspects of the proposed wording but has not challenged the allocation as such. See Enclosure 2 to my Instructions.

(1) Whether the case of ***R (H and others) v Ealing LBC*** is relevant and whether it prevents the proposed restrictions to racing-related affordable housing; and

(2) If it is relevant what modifications may be required to the proposed restrictions to make them lawful.

5. ***R (H and others) v Ealing LBC*** [2016] H.L.R. 20 concerned a successful challenge to a local authority's policy for housing allocation under the Housing Act 1996. It did not concern the imposition of a planning obligation with regard to affordable housing, specifically directed to meet a sectoral need for housing, which is recognised by the local plan. As discussed below, the context is very different and in my opinion the case is not applicable to the present circumstances.

6. The allocation policy in ***Ealing*** was described by the Deputy Judge (HHJ Waksman QC) as follows:

> "3. By the change to its housing allocations policy, the Council introduced a scheme whereby 20% of all available lettings would be removed from the general pool and would be reserved for (a) "Working Households" and (b) "Model Tenants". In brief, a working household was one where the applicant or another member of the household worked for at least 24 hours per week. A model tenant was an applicant for transfer who already had a Council secure tenancy but who was seeking more appropriate accommodation and who had complied with the terms of the tenancy. I shall refer to this change as "the Scheme". The broad aims behind it are to incentivise tenants to work or return to work and to encourage good tenant behaviour. As will become apparent, policies along similar lines have been introduced in other London councils including Barnet, Bexley and Hammersmith and Fulham."

7. The Deputy Judge found the policy to directly and indirectly discriminatory and also breached the public sector equality duty ("**PSED**") in s. 149 of the Equality Act 2010 (the 2010 Act") as well as Art 14 of the ECHR read with Article 8. The discrimination was not justified on the facts either under the 2010 Act or under art. 14 having regard to ***Bank Mellat v Her Majesty's Treasury (No.2)*** [2014] A.C. 700.

8. The policy in question was adopted under Part 6 of the Housing Act 1996 (as amended) which governs the allocation of housing accommodation by local housing authorities. In England, under s. 166A a local authority must have a scheme for determining priorities and procedures in the allocation of their housing and must not allocate housing except in accordance with that scheme. See s. 166A(1) and (14), which provide:

> "(1) Every local housing authority in England must have a scheme (their "allocation scheme") for determining priorities, and as to the procedure to be followed, in allocating housing accommodation.
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> For this purpose "procedure" includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken.

…

(14) A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme."

9. In the present planning context, FHDC is not advancing a housing allocation policy but is seeking to impose a planning obligation to satisfy its (emerging) policy requirement to provide housing specifically for those involved in the HRI. In formulating its development plan proposals, FHDC will have to consider equalities issues but will be under a duty to provide for a wide range of housing needs, of which the specific needs of the HRI in Newmarket will only form part. FHDC's housing department's concern can therefore be resolved since the proposals, the policy and proposed obligation only relate to one aspect of the district's housing need. In my opinion it would not be correct to assume that every housing site should be open to every category of person who may need housing where it is not proposed as such nor does planning policy require it. Again, the housing needs of all must be met through the local plan, which is a collection of policies and allocations, not by each and every allocated or even windfall site.

10. This is made clear by the NPPG on local plans (NPPG, Section 12) which includes the following (emphases added):

"**What should a Local Plan contain?**

The Local Plan should make clear what is intended to happen in the area over the life of the plan, where and when this will occur and how it will be delivered. This can be done by setting out broad locations and specific allocations of land for different purposes; through designations showing areas where particular opportunities or considerations apply (such as protected habitats); and through criteria-based policies to be taken into account when considering development …

Local Plans should be tailored to the needs of each area in terms of their strategy and the policies required. They should focus on the key issues that need to be addressed and be aspirational but realistic in what they propose. The Local Plan should aim to meet the objectively assessed development and infrastructure needs of the area, including unmet needs of neighbouring areas where this is consistent with policies in the National Planning Policy Framework as a whole. Local Plans should recognise the contribution that Neighbourhood Plans can make in planning to meet development and infrastructure needs." (Paragraph: 002 Reference ID: 12-002-20140306)

"**How should local planning authorities express the need for different types of housing in their Local Plan?**

Local planning authorities should ensure that the policies in their Local Plan recognise the diverse types of housing needed in their area and, where appropriate, identify specific sites for all types of housing to meet their anticipated housing requirement. This could include sites for older people's housing including accessible mainstream housing such as bungalows and step-free apartments, sheltered or extra care housing, retirement housing and residential care homes. Where local planning authorities do not consider it appropriate to allocate such sites, they should ensure that there are sufficiently robust criteria in place to set out when such homes will be permitted. This might be

supplemented by setting appropriate targets for the number of these homes to be built." (Paragraph: 006 Reference ID: 12-006-20150320)

11. The local plans section of the NPPG, and paras. 150-159 of the NPPF, also underline the need for a sound and comprehensive evidence base as to how the plan will meet local needs and how the proposals in the plan will be deliverable. The NPPF includes the following:

> "**Using a proportionate evidence base**
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> 158. Each local planning authority should ensure that the Local Plan is based on adequate, up-to-date and relevant evidence about the economic, social and environmental characteristics and prospects of the area. Local planning authorities should ensure that their assessment of and strategies for housing, employment and other uses are integrated, and that they take full account of relevant market and economic signals.
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> **Housing**
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> 159. Local planning authorities should have a clear understanding of housing needs in their area. They should:
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> ● prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The Strategic Housing Market Assessment Plan-making should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which:
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> – meets household and population projections, taking account of migration and demographic change;
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> – addresses the need for all types of housing, including affordable housing and the needs of different groups in the community (such as, but not limited to, families with children, older people, people with disabilities, service families and people wishing to build their own homes);34 and
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> – caters for housing demand and the scale of housing supply necessary to meet this demand;
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> ● prepare a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period."

12. NPPG Section 2a "Housing and economic development needs assessments", as its title suggests, provides guidance on assessing local needs. I will not set out here the details of the approach to be taken but note the following as part of the housing need exercise:

> "**How should affordable housing need be calculated?**
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> Plan makers working with relevant colleagues within their local authority (eg housing, health and social care departments) will need to estimate the number of households and projected households who lack their own housing or live in unsuitable housing and who cannot afford to meet their housing needs in the market.
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> This calculation involves adding together the current unmet housing need and the projected future housing need and then subtracting this from the current supply of affordable housing stock." (Paragraph: 022 Reference ID: 2a-022-20140306)

"**What types of households are considered in affordable housing need?**

The types of households to be considered in housing need are:

- homeless households or insecure tenure (e.g. housing that is too expensive compared to disposable income);
- households where there is a mismatch between the housing needed and the actual dwelling (e.g. overcrowded households);
- households containing people with social or physical impairment or other specific needs living in unsuitable dwellings (e.g. accessed via steps) which cannot be made suitable in-situ
- households that lack basic facilities (e.g. a bathroom or kitchen) and those subject to major disrepair or that are unfit for habitation;
- households containing people with particular social needs (e.g. escaping harassment) which cannot be resolved except through a move." (Paragraph: 023 Reference ID: 2a-023-20140306)

13. See the Site Allocation Plan Options (Third Stage 18) April 2016[2] which includes the following which underlines the fact that meeting housing need is a consideration for the whole plan and not simply one application:

> "2.5 In 2011 a High Court Order required that one aspect of the adopted 2010 Core Strategy be reviewed. For this reason a Core Strategy Single Issue Review (SIR) is underway to review the overall housing numbers and distribution across the district. This SALP has been prepared in parallel with the SIR, and both documents are at the Preferred Options stage ..."
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> "2.6 The Core Strategy is the principal Local Plan document, providing the overall strategic vision for Forest Heath to 2026 and looking ahead to 2031 for residential growth. This SALP must, ultimately, identify appropriate and adequate sites to deliver the number, distribution and phasing (of delivery), of new homes as identified in the emerging SIR document."
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> "2.10 The sites identified in this consultation document, are the council's preferred sites to deliver the growth necessary in the district to 2031, and therefore meet Option 1, the council's preferred housing distribution option in the SIR."

14. The SIR[3] Preferred Option referred to in the SALP was produced at the same time as the SALP and, relevant to the issue of meeting hosing needs in the district, notes:

> "**What the evidence tells us**
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> 3.10 The SHMA was prepared in 2013 and indicated an objectively assessed need (OAN) for 350 dwellings per annum for Forest Heath in the period 2011-2031, or 7000 homes in total. This figure was used to inform the two options for the overall housing provision planned for at the 2nd Issues and Options stage of the SIR.
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> 3.11 Following changes in national policy and guidance, and other local circumstances including the planned closure of the RAF Mildenhall airbase, an update of the objectively assessed housing need was commissioned. Cambridge Research Group published an

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[2] www.westsuffolk.gov.uk/planning/Planning_Policies/local_plans/upload/SALP-V3-low-res-FINAL-FOR-WEB.pdf

[3] Single Issue Review (SIR) of Core Strategy Policy CS7 Overall Housing Provision and Distribution, Preferred Option April 2016. See www.westsuffolk.gov.uk/planning/Planning_Policies/local_plans/upload/SA-2015-FINAL-artwork-low-res-with-revisions.pdf.

updated OAN in January 2016, indicating a revised 'all homes' need for 6800 dwellings, 200 dwellings lower than the previous SHMA indicated and this covers the same time period 2011-2031. This assessment was supported by evidence prepared by Peter Brett Associates (PBA) on behalf of the council which considered the impact of market signals on both the objectively assessed housing need and whether an uplift is justified in setting a housing provision target to meet more of the affordable housing need. Both reports can be read in full at http://westsuffolk.jdi-consult.net/localplan/

3.12 National planning policy and guidance makes clear that local planning authorities should undertake their own assessment of their housing needs and set an appropriate target to meet these needs. The process for setting this housing provision target is clearly set out in the PBA report. The PBA report concludes that an uplift of 5% is appropriate adjustment, giving rise to an overall OAN of 6800 dwellings. This figure was also considered appropriate as a housing provision target.

3.13 The affordable housing need for 2014 for the district has been confirmed at 2638 dwellings, 65 fewer than the 2703 dwellings reported at the Issue and Options stage. This slight reduction in need when read alongside the reduced 'all homes' housing need of 6800 will not materially alter the overall balance between affordable need and 'all homes' need previously reported at the Issues and Options stage.

3.14 The OAN of 6800 dwellings over the plan period from 2011 to 2031, updates the previously assessed need of 7000 dwellings in2013 and therefore it is appropriate to plan for the updated figure."

15. The two Preferred Options sets out how FHDC proposes to meet the need and its approach to identifying and allocating sites.

16. It is therefore clear that provided FHDC is following national guidance in the formulation of its local plan options, and making provision for objectively assessed housing needs, it should be addressing the needs, whether for market or affordable housing, of the district as a whole. This, if done in accordance with national guidance, should ensure compliance with equality duties since all those in need will be included in the assessment and provided for in the plan. I assume, as appears to be the case from the extracts from the April 2016 Options papers set out above, that FHDC is acting in accordance with national guidance in assessing and seeking to meet its total housing needs.

17. It is clear, therefore, that meeting housing need is a much wider issue than the consideration of any individual planning application.

18. It follows that it therefore would be mistaken to focus on two sites intended to meet one aspect of the local housing need, still less given that this is only part of a response to a planning application to meet part of the overall need. This is quite different from a housing allocation policy under the 1996 Act considered in Ealing the purpose of which is to provide an allocation policy for all those in need. The purpose and context of the present application are far removed from that in ***Ealing***.

19. In passing I note that in ***Ealing*** the justification context the Deputy Judge rejected the "manifestly without reasonable foundation" test which has recently been reaffirmed by the Supreme Court in the welfare policy context (bedroom tax) in ***R (Carmichael and Rourke) (formerly known as MA and others) v Secretary of State*** [2016] UKSC 58 (9.11.16) at [28]-[38] (Lord Toulson). The issue is academic here but the fact that the Court in this respect at least is arguably inconsistent in part with recent Supreme Court authority is a reason to treat it with some caution at least.

20. I therefore do not consider that FHDC housing need be concerned that the ***Ealing*** case is dealing with the same issue, or that to grant planning permission in accordance with its policy itself is a matter which is a cause for concern in terms of discrimination under the 2010 Act. If there were to be a target for discrimination, that should be the local plan, or emerging local plan, if it did discriminate against some of those in housing need but in any event it would fail to meet the test of soundness for local plans if it did not seek to meet all its housing needs in accordance with national guidance.

21. Indeed, the logic of adopting the view that the application had to be approached as required for the policy in ***Ealing*** would mean that no development could be conditioned for specific occupiers or needs without giving rise to Equality Act 2010 issues. Once it is understood that each planning permission is only part of the means by which the planning authority makes provision for its overall housing need, then the concerns regarding equality can be seen not to arise.

22. It is open to FHDC if it considers it necessary to undertake an equality assessment to ensure that it complies with its PSED and considers the implications of granting permission.

23. Indeed, the issue of planning policy and the PSED was recently considered by the Court of Appeal in ***R (West Berkshire DC) v. Secretary of State*** [2016] 1 WLR 3923. In reversing the High Court's decision that part of the NPPG policy on affordable housing was unlawful, including for breach of the PSED, Laws and Treacy LJJ held (having quoted from the equality assessment at [80]-[82]):

> "83 It seems to us that this statement demonstrated a consideration of the potential for adverse impacts on protected groups. <u>The requirement to pay due regard to equality impact under section 149 is just that. It does not require a precise mathematical exercise to be carried out in relation to particular affected groups or, for example, urban areas as opposed to rural areas. The assessment undoubtedly acknowledged the effect of the proposals upon protected groups but sought to place that in context by reference to other policies impacting on affordable housing</u>.
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> 84 A significant difference between the arguments presented to us related to the question of whether it was legitimate to have regard to other policies in the field of

affordable housing. It seems to us that to assess the new policy without reference to other policies which are germane would be to adopt too narrow an approach. Viewed in this light, the prospect of an impact within the 21% cohort was properly viewed as "minor" in the context of affordable housing overall. The judge's finding that there was an inconsistency between the use of the word "minor" and the assessment of "significant impact" within the 21% cohort was not justified. When the broader picture of overall affordable housing provision was considered, the use of the word "minor" was not inappropriate. It represented the minister's assessment of the weight to be given to the equality considerations in the light of all relevant factors in accordance with *Bracking's case* [2014] Eq LR 60 .

85 Whilst it may fairly be said that the equality statement takes a relatively broad brush approach as compared to the exercise urged by the claimants and adopted by the judge, we consider that compliance with the terms of section 149 was achieved by what was done in this case. In so far is the judge adopted a more stringent and searching approach to the equality statement we consider that he was in error.

86 That finding does not dispose of this issue, … We have to consider the effect of the failure to consider section 149 at the right time in the light of our conclusion that the eventual equality statement satisfies the statutory requirements. A reading of Buxton LJ's comments at para 49 of *C's case* [2009] QB 657 might appear to favour the quashing of the decision solely by reason of the fact that the equality statement was not prepared as part of the decision, and post-dated it. However, reference to para 54 of *C's case* shows that late preparation of the assessment is not necessarily conclusive on the question of whether quashing the decision should automatically follow. There seems to us to be some degree of tension between paras 49 and 54, and there have been situations in which this court has not quashed a decision, notwithstanding a failure to address equality impacts at the correct point in time.

87 Nothing we say should be thought to diminish the importance of proper and timely compliance with the PSED. But we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, Mr Forsdick accepted that if an assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think this was a correct concession. The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later assessment, although the court is entitled to look at the overall circumstances in which that assessment was carried out. In *C's case* a particularly dilatory state of affairs was identified which was of importance to the exercise of the court's discretion as to remedy. The decision in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] ACD 20 appears to represent the other end of the spectrum. The present case falls somewhere between the two on that spectrum. We do not think that C's case necessarily demonstrates that an order quashing the decision must follow."

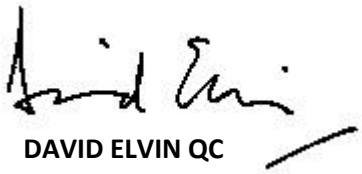
24. The consideration of an assessment to discharge the PSED which may be undertaken in the context of either planning policy or a specific application need only be in the terms described by the Court of Appeal above and can be relatively broad brush. In particular, as the judgment noted at [84] –

> "It seems to us that to assess the new policy without reference to other policies which are germane would be to adopt too narrow an approach"

This underlines the need to consider the context in which the housing needs of the district are met, namely by the plan and development management system as a whole and not by a single application such as the present proposal.

25. In the light of the above, I do not consider there is any need to introduce any specific amendment to the proposed obligation with regard to letting and occupation. It is a matter for FHDC how it proposes to discharge the PSED with regard to the planning application but an equality assessment could be undertaken by FHDC to ensure the PSED issues were properly considered by FHDC members when determining the application. However, it would have to look at the context in which the local plan will address all housing needs within the district.

26. I have nothing to add as currently instructed.



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