**McCarthy and Stone and Others v GLA (2018)**

The Mayor of London issued new Supplementary Planning Guidance in 2017 on affordable housing and viability, relating to policies in the adopted London Plan. This introduced a ‘threshold approach’ to negotiating affordable housing delivery or contributions in lieu on the grant of permission for residential development which was challenged by four specialist retirement developers; McCarthy and Stone Retirement Lifestyles Ltd., Churchill Retirement Living Ltd., Pegasus Life Ltd., and Renaissance Retirement Ltd. The claimants argued that this approach had an immediate and damaging impact on their ability to acquire and develop land.

The Guidance introduced a new ‘fast-track’ approach, seeking to incentivise developers to bring forward proposals with at least 35% affordable housing on site – in the context of a London-wide target of 50%. The main benefit of that procedure would be for those incoming applications meeting the minimum threshold (without public subsidy and meeting the other policy tests) is that they would not be subject to viability testing and only subject to an early viability review if an agreed level of progress was not made within two years of the grant of permission.

Developments failing to meet the 35% threshold are, under the Guidance, subject to rigorous and publicly transparent viability testing with early and late stage viability reviews to ensure an increase in affordable housing contributions if viability improves over time.

The developers argued that this policy significantly increased development risk, owing in large part to the use of late stage reviews which would add uncertainty and affect borrowing calculations. This, it was stated, would make it more difficult to compete with general housebuilders in site acquisition. These effects were not accepted by the Mayor in defending the case.

The claimants sought to argue the SPG was unlawful on three grounds:

1. It (a) constitutes policy which should only be in the London Plan, which is currently being revised, and (b) the SPG is inconsistent with the adopted Plan;
2. the SPG is a ‘plan or programme’ requiring a Strategic Environmental Assessment (SEA) which had not been undertaken;
3. It was produced without due regard to the public sector equality duty (PSED).

The High Court refused permission to argue Grounds 2 and 3, allowing only Ground 1 which considered the argument of whether the Guidance introduced policy ‘in disguise’ and was inconsistent with the adopted Plan.

The adopted Local Plan policy indicates that reviews may be sought on residential developments to assist with the policy aim of maximising the contribution of affordable housing. The SPG goes further in mandating the use of early and late stage reviews for those developments not achieving the 35% affordable housing threshold, imposing a further layer of financial assessment. This, the Judge determined, was inconsistent with the adopted Plan and requires remedy, which he has invited submissions on.

The argument that the threshold approach constituted the introduction of policy was not successful however, with Justice Ouseley commenting that the Mayor is:

*“entitled to recognise that the production of viability appraisals is time-consuming and expensive, and to seek to introduce incentives for developers to increase very substantially the offer of affordable housing, so as to avoid that time and expense, and he is entitled to deal with delayed starts and longer time scale developments by way of re-appraisals. I think that policies 3.11 and 3.12, especially 3.12B permit him to take the view that an incentive to developers to make generally very much larger proportions of a site available for affordable housing* *is a proper use of the development control procedures to which SPG can be properly applied. After all it is no more than offering the opportunity to avoid a process, but not at the price of the fundamental aim.”*

Justice Ouseley further commented that the status of the SPG *“matters little now that the draft London Plan has been published”* as this contains the approach introduced by the SPG. The approach has already been adapted by Bristol City Council, and this judgement may encourage local planning authorities elsewhere to follow suit. Irrespective of the judgement, it is disappointing that the different nature and nuances of specialist retirement accommodation has not been recognised in policy.